No. 76-1867

Supreme Court, U. S.
FILED
JUN 27 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

BERNHARD ROSEE,

Plaintiff-Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIRBY and SAM GORDON,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS

WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illinois 60602
Attorney for Plaintiff-Petitioner

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provision Involved 3

Statement of the Case 3

Finding by the Trial Judge 15

Finding of the Appellate Court 16

Argument 18

I.

The Appellate Court's Decision Denied Petitioner Due Process Of Law By Holding That Issues Decided By The Arbitration Committee Were Conclusively Resolved And Were Not Subject To Contrary Determination By The Trial Court 18

II.

Petitioner Was Denied Due Process Of Law By The Appellate Court's Substitution Of Its Findings Of Fact For Those Of The Trial Judge 29

Conclusion 30

LIST OF AUTHORITIES

Arnold v. United Air Lines, 296 F. (2) 191, 193, C.A. 7 27

Baisky v. Board of Regents of N. Y., 347 U.S. 442, 469 28

Barrows v. Jackson, 346 U.S. 249 28

Baxter v. Board of Trade, 83 Ill. 146, 149 23

	PAGE
Board of Trade v. Johnson, 264 U.S. 1	22
Board of Trade v. Nelson, 162 Ill. 431, 439; 44 N.E. 743, 745	23
Bostedo v. Board of Trade, 227 Ill. 90, 91, 81 N.E. 42, 43	23
Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680	28
Chas. Wolff Packing Co. v. Court of Indust. Relations, 262 U.S. 522, 544	25
Cocalis v. Nazlides, 309 Ill. 152, 139 N.E. 95, 98	25
Deakton v. L. D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973)	21
Dorchy v. Kansas, 264 U.S. 286	25
Doud v. Hodge, 350 U.S. 485	28
Edward v. Capital Air Lines, 176 F. (2) 755, 760, 761; App. D.C. cert. den. 338 U.S. 855	27
Ellerd v. Southern Pac. R. Co., 241 F. (2) 541, 544, C.A. 7	27
Fisher v. Board of Trade, 80 Ill. 85, 87	23
Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16, 17	24
Hill v. Mercury Record Corp., 26 Ill. App. 350, 361; 168 N.E. (2) 461, 466	24
Horan v. Blowitz, 13 Ill. 2d 126, 148 N.E. 2d 495, 499 (1958)	29
Mengel v. Nashville etc. Union, 221 F. (2) 644, 647, C.A. 6	25
Pacaud v. White, 218 Ill. 138, 147, 148; 75 N.E. 779-782	23
Phillips Petroleum Co. v. Jenkins, 297 U.S. 629	28

	PAGE
People ex rel. v. Board of Trade, 80 Ill. 134, 137	23
People ex rel. Page v. Board of Trade, 45 Ill. 112, 116, 118	23
Pitcher v. Board of Trade, 121 Ill. 412, 419, 421; 13 N.E. 187-189	23
Re Murchison, 349 U.S. 133, 136	22
Re Smith, 381 Pa. 223, 230; 112 Atl. (2) 625	25
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)	20
Ryan v. Cudahy, 157 Ill. 108, 119 (1895)	20
Shelley v. Kraemer, 334 U.S. 1	28
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	20
Steele v. L. & N. R. Co., 323 U.S. 210, 213	26
Sturges v. Board of Trade, 86 Ill. 441, 442	23
Trax v. Raich, 239 U.S. 33, 38	28
Weaver v. Fisher, 110 Ill. 152, 153	22
Yick Wo v. Hopkins, 118 U.S. 356	29

STATUTES AND OTHER AUTHORITIES

Fourteenth Amendment of the United States Constitution	3
The Commodity Exchange Act [title 7, sec. 1 *et seq.* U.S.C.]	11
Legislative Act to Incorporate the Board of Trade, Section 7, adopted by Illinois Legislature in 1859	18
28 U.S.C. 1254	2
28 U.S.C. 1343	23
42 U.S.C. 1983	23
6A Corbin on Contracts (1962)	25

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

BERNHARD ROSEE,

Plaintiff-Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIRBY and SAM GORDON,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois in this case.

OPINION BELOW

The Opinion of the Appellate Court of Illinois is reproduced in Appendix "A" *infra.* This Opinion is reported at 43 Ill.App.3d 203. Leave to appeal the decision of the Appellate Court was denied by the Supreme Court of Illinois on January 28, 1977.

JURISDICTION

The order of the Supreme Court of Illinois denying leave to appeal from the Appellate Court of Illinois was entered January 28, 1977. The jurisdiction of this Court is involved pursuant to 28 U.S.C. Sec. 1254. Leave was granted by this Court on April 19, 1977, extending the time for filing the instant Petition to and including June 27, 1977.

QUESTIONS PRESENTED FOR REVIEW

1. May a member of the Board of Trade of the City of Chicago, an association which has virtual total economic life and death control over commodity trading, who has been compelled to arbitrate a dispute or suffer the loss of valuable property rights, and who thereafter engages in a mandatory arbitration proceeding which fails to provide fundamental procedural safeguards and rights, be precluded, consistent with the Due Process Clause of the Fourteenth Amendment, from litigating in a court of competent jurisdiction those issues determined in the course of such arbitration proceeding.

2. Consistent with the Due Process Clause of the Fourteenth Amendment, may a person who has been compelled to arbitrate a dispute or suffer the loss of valuable property rights, and who therefore engages in such mandatory arbitration, be precluded from litigating his claims in a court of competent jurisdiction by virtue of the fact that he has engaged in arbitration.

3. Where, in the course of trial, substantial evidence is introduced supporting the claims of a party and on the basis of such evidence the trial judge, sitting without a jury, makes findings of fact and renders judgment in favor of said party, may an appellate tribunal, consistent with the Due Process Clause of the Fourteenth Amendment, substitute contrary findings of fact based upon the same evidence and set aside the decision of the trial court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1963, petitioner commenced this action in the Circuit Court of Cook County, Illinois, against, *inter alia,* the Board of Trade of the City of Chicago (hereafter, "the Board" or "the Board of Trade"), various Board members (individually and as members of the Board's Committee of Arbitration), James E. Baggot, Jr., and Donald Morrison (individually and d/b/a Baggot and Morrison) and Harris Haywood, the managing employee of the firm of Baggot and Morrison. Petitioner, who had been a member of the Board of Trade from 1944 until the occurrence of the events which formed the basis for this action and who had traded through the firm of Baggot and Morrison from 1958 through part of the year 1960, sought damages

for conspiracy, fraud, misrepresentation, defamation, malicious interference with occupation and breach of a fiduciary relationship. The case was ultimately tried in the Circuit Court of Cook County before Judge Nathan Cohen, sitting without a jury, and he entered judgment in favor of plaintiff and against the defendants, James E. Baggot, Jr. (hereafter "Baggot"), Donald W. Morrison (hereafter "Morrison"), and Harris Haywood (hereafter "Haywood"), jointly and severally, in the sum of $399,139.42 in compensatory damages. He also awarded plaintiff exemplary damages of $150,000 against Morrison and $150,000 against Haywood. The remaining defendants, the Board of Trade of the City of Chicago, its officers and members of its Committee of Arbitration (hereafter referred to collectively as "The Board of Trade defendants") were dismissed at the conclusion of the plaintiff's case.

The defendants Baggot, Morrison and Haywood appealed from the said judgments against them, and plaintiff cross-appealed from the judgment in favor of the Board of Trade defendants.

The Appellate Court, in a lengthy opinion set forth in Appendix "A" to this Petition, reversed the judgment in favor of plaintiff and remanded the cause to the trial court with directions to enter judgment in favor of the defendants Baggot, Morrison and Haywood. The Court also affirmed the judgment in favor of the Board of Trade defendants. The Supreme Court of Illinois subsequently denied petitioner leave to appeal.

Before describing further the nature of this case, a brief outline of the circumstances which preceded the litigation is advised. This case represents the nineteen-year fight of one man, Bernhard Rosee, against almost

invincible opposition in an effort to prove that he is an honest man who has been injured in his reputation and income to a degree seldom experienced by anyone. Bernhard Rosee has been a trader in commodities since 1925, and until the occurrences set forth herein, had been a member of the Board of Trade of the City of Chicago since 1944. The cast of characters in these proceedings fall into three categories; (1) the Board of Trade of the City of Chicago and certain of its members and officers; (2) James E. Baggot, Jr. and Donald W. Morrison, doing business in partnership form as Baggot and Morrison, together with Harris Haywood, the managing employee of Baggot and Morrison; and (3) certain agents and employees of the Commodity Exchange Authority.

During the period of time in which he was a member of the Board of Trade of the City of Chicago, Bernhard Rosee had from time to time voiced complaints against certain of the defendants. Among the persons of whom Rosee had been critical were certain of the persons described above as being members or officers of the Board of Trade of the City of Chicago. Some of Rosee's complaints resulted in the conviction of certain of these persons for violation of the Commodity Exchange Act. (In fact, respondent Baggot was recently charged in a criminal information with such violations and entered a plea of guilty within the past week.) The members criticized and their confederates had long engaged in activities having as their end depriving Rosee of his membership on the Board of Trade. By so doing, they hoped to silence his criticisms, or at least render them ineffective.

Rosee began to trade through Baggot and Morrison in the year 1958. Throughout the year 1959 and during part of the year 1960, Baggot and Morrison systematically

cheated and defrauded Rosee in his trades. In so doing, Baggot and Morrison used a large variety of devices, the most frequent of which was Baggot and Morrison's recording a large number of unprofitable trades as being trades of Rosee. During this period, Rosee was extremely trusting. This trust was fortified by the false and manipulated records furnished him by Baggot and Morrison.

After indulging in the above machinations for some time, Baggot and Morrison unjustifiably and unauthorizedly closed out Rosee's account on November 9, 1959, and informed him that his account contained no money, even though Baggot and Morrison owed Rosee $20,000.00 on that date. The close out resulted in a substantial loss to Rosee of some $24,000.00. Rosee protested this action, stating that the books of Baggot and Morrison were false and requested from them the original records relating to his trades. They were not produced; despite promises over the years by various of the defendants, they never have been.

Subsequently, on June 3, 1960, Morrison filed a complaint with the Board of Trade under its Rule 130, asserting that Rosee owed Baggot and Morrison some $27,308.82 and, therefore, that one-half the amount ($13,654.41) was owed to him. Having no choice under the mandatory arbitration provisions of Rule 30, Rosee requested that the matter be submitted to the Committee of Arbitration of the Board of Trade of the City of Chicago.

It was during the arbitration that those persons who were members and officers of the Board of Trade of the City of Chicago were given an opportunity to settle their grudge against Rosee. Under its purported rules, Rosee was afforded a so-called trial without opportunity of

counsel or presentation of witnesses. The following are but highlights of the arbitration proceedings:

(a) It was represented to Rosee that the original records relating to his account with Baggot and Morrison which he had requested, would be made available to him at the arbitration hearing, thereby inducing him to submit to arbitration. Baggot and Morrison later refused to produce such records which had been requested. They were not, and have never been, produced. (Arb.Tr., p. 35, 65, 116-126, 175, 187, 270-274)

(b) James Coughlin, a skilled and experienced attorney, was appointed as prosecutor of Morrison's claim against Rosee before the Arbitration Committee and to represent Morrison therein, and at the same time Rosee was denied the right to be represented by counsel at such hearing. The pretext used to authorize Coughlin's appearance was that he was also a member of the Board. (Arb. Tr., p. 134-142)

(c) The Committee of Arbitration refused to afford Rosee the right to subpoena books, records and witnesses in his behalf, and further refused to order certain members of the Board of Trade to appear as witnesses on his behalf. (Arb. Tr., p. 211-213)

(d) The [illegible]mittee of Arbitration received evidence outside [illegible]osee's presence. (Arb. Award, Def. Ex. 7)

(e) The Committee of Arbitration refused to permit Rosee to file a counterclaim against Baggot and Morrison. (Arb. Tr., p. 121-126)

(f) The Committee of Arbitration caused to be entered against Rosee, on or about December 16, 1960, an award in favor of Morrison in the sum of $11,323.78 (Board of Trade Ex. 7, R. 2951; A. 1386).

(g) Rosee's appeal to the Committee of Appeal was summarily denied without affording him an opportunity to adequately prepare or present the same. (Board of Trade Ex. 8, R. 2953; A. 1386).

(h) On or about March 1, 1961, as a result of the proceedings before the Committee of Arbitration, Rosee's rights, privileges and benefits of membership in the Board of Trade were suspended, this fact to be published among all members of the Board of Trade, in every State of the Union and all over the world. (Board of Trade Exs. 9 and 10; R. 2954; A. 1387).

The instant litigation was commenced in 1963 in the Circuit Court of Cook County against various defendants, including certain federal officials employed by the Commodity Exchange Authority. The case was removed to the United States District Court for the Northern District of Illinois, and after years of litigation, summary judgment was entered in favor of the federal officials and the case remanded to state court. (It should be noted that in an order dated June 28, 1976, District Judge Hubert Will amended his opinion on the basis of newly discovered evidence, the judge holding that "the Rosee deficits referred to in this Court's opinion were contained in a document tendered by the government which this Court is now satisfied and finds to be false and fraudulent." The Appellate Court ignored this order.)

On remand, the case was tried before the Judge Nathan Cohen wherein, after an extensive trial covering over 3,000 pages of transcript, judgment was entered in plaintiff's favor. The evidence included substantial testimony demonstrating the foregoing facts regarding the arbitration proceedings. While petitioner recognizes that the purpose of this Petition is not to restate all of the additional evidence adduced at trial, the third issue raised herein compels a capsulized and limited discussion of that data. By no means does this Petition set forth even a substantial portion of the evidence considered by Judge Cohen.

A logical starting point relates to the business conditions at the clearing firm of Baggot and Morrison. The dire straits of this firm clearly provide motive for the fraudulent dealings with the plaintiff. As evidenced by the testimony of defendant Haywood, Baggot & Morrison was desperately in need of money in the fall of 1959 in order to provide the necessary margins for its house account and in order to maintain the required level of funds necessary to allow all customers to close out their accounts with full payment of their equities in the firm (R. 346; A. 392-393).

Plaintiff was a trusting customer who rarely checked his true equity in the books of Baggot and Morrison. He provided an excellent target for the fraudulent plan enacted by the defendants. As early as the spring of 1958, Baggot & Morrison sustained serious losses and considered Rosee a trusting customer who rarely checked his true equity on the books of Baggot and Morrison, a source of illegal revenue. (R. 2924-2926; A. 1371-1372)

There is no question that Baggot and Morrison was often far short of the money required to be held to margin the house and customers' trades. Haywood testified that employees of Baggot and Morrison traded without using their own money to back up their trades and whatever losses from the trading "were taken from the customers' segregated funds." (R. 2189-2190; A. 1047).

Both in Haywood's testimony and in Plaintiff's Exhibit 72, a CEA Audit Report, it was shown that Baggot and Morrison withdrew money from the customer's segregated funds account and used it for house trades.

In fact, the firm of Baggot and Morrison was continually undersegregated during several continuous periods,

including March 1959 through April 9, 1959, as evidenced by the testimony of Haywood in reference to Plaintiff's Exhibit 73, another CEA document. (R. 2471; A. 1190). In short, the evidence showed that Baggot and Morrison had misappropriated customer funds, including those of Bernhard Rosee.

After presentation of extensive evidence, it became clear that Baggot & Morrison was short of funds necessitating the use of customers' funds, particularly on September 17, 1959, which proved to be one of the key dates in this case. The trial court finally terminated plaintiff's proof on this point, noting what was obvious to everyone, that Baggot & Morrison had been underfunded. (R. 2451-2452; A. 1184)

This evidence of under-segregation and the use of plaintiff as a source of desperately needed revenue began a pattern which started with general misuse of customers' funds, continued in a concentrated plan to defraud plaintiff in hopes of gaining financial stability, and culminated in his suspension and the sale of his membership on the Board of Trade.

The flagrant violations of the Rules and Regulations promulgated under Commodities Exchange Act, its regulations and of basic fair business practice finally influenced the CEA to impose sanction on Baggot & Morrison.

The evidence showed that not only in the arbitration proceedings, but at trial as well, defendants failed to produce the very critical records required by law to be kept to substantiate the alleged deficits attributed to plaintiff. Segmented records which were produced often conflicted with government reports and other Baggot &

Morrison records. Deliberate concealment, destruction, and alteration of records in this case was clear and convincing evidence of fraud. The Commodity Exchange Act [title 7, sec. 1 *et seq.*, U.S.C.] authorizes the promulgation of Rules and Regulations. Under section 1.31 of those Rules and Regulations, which was in force at the time in question, Baggot and Morrison was required to keep its records for five (5) years.

Plaintiff's suit was filed soon after the Arbitration proceedings, and in any event, well within that period, and the case has never been closed. Therefore, defendants at all times knew the importance of *safeguarding* these critical records and their continuous failure to produce them leads to the presumption that they were extremely damaging.

Other statutory requirements pertaining to records to be kept by futures commission merchants such as Baggot and Morrison include Section 1.32: "Segregated Account" and Section 1.35: "Records of Cash Commodity and Futures Transactions."

Throughout this seventeen-year fight, the script has always been the same. Plaintiff has continuously requested and demanded the original records which underlie the manufactured compilations submitted by defendants at every level of these proceedings. He has been frustrated at every level to the point of virtual open defiance to an order by the trial judge. The conclusion to be drawn from this failure on the part of defendants to produce these critical records is undeniable. Plaintiff's claim during the Arbitration proceedings to the present that the records would clear his name is irrefutable.

One of the most important records never produced were the daily segregation statements. These records

have been the subject of concealment throughout the plaintiff's struggle for justice notwithstanding the assurances of Mr. Morrison of their availability in his deposition of October 27, 1970.

It is not contested that the daily segregation statements show the amount of money required to be held by the clearing firm (Baggot and Morrison) in order to pay off each customer at the close of each day's business in the event payment was demanded. The evidence showed that actual payment was not possible because Baggot and Morrison was continuously undersegregated. The records would have shown each person's position; defendant Haywood so testified. (R. 346; A. 392-393)

It cannot be seriously contended that the missing daily segregation records would not have shed light on the issues raised in this case. Defendant Haywood himself referred to the daily segregation statements as "very important". (R. 385-386; A. 408). These records would have further substantiated plaintiff's evidence of the undersegregation at Baggot and Morrison and could have conclusively shown that Baggot and Morrison was required to put up margins far in excess of what money they had on deposit in the customer segregated funds account, thereby establishing wrongful use of plaintiff's funds. More importantly, the daily segregation records would have established Rosee's true position in Baggot and Morrison day by day. It is inconceivable that over 70,000 daily segregation statements would suddenly disappear from the Board of Trade storeroom.

Judge Cohen recognized the importance of the missing daily segregation statements and witnessed throughout the trial the difficulties encountered in establishing the

correct positions of plaintiff due to the scanty and often fraudulent records that were produced (R. 2388-2389; A. 1153-1154).

Purchase and Sales slips were another type of record which Baggot and Morrison was required to keep in the course of its business. Purchase and Sales slips were made up for each trader whenever an open position was to be closed. After an open posittion was closed, or the contract of purchase or sale was finalized, the Purchase and Sales slip was prepared to show whether there had been a profit or loss on that particular transaction. The profit or loss of trades made by plaintiff and those wrongfully claimed to have been made by plaintiff is, of course, basic to this action.

Again, the evidence of concealment and alteration of records was overwhelming. Purchase and Sales slips were kept in a looseleaf fashion and, after the trader received his copy, Baggot and Morrison had a permanent numbered copy for their records. However, defendant Haywood confessed to the removal of pages (Nos. 864-900) on or about December 28, 1959 from a Purchase and Sales book which was to remain as Baggot and Morrison's permanent record. Haywood repeated the removal process on several Baggot and Morrison Purchase and Sales books, all allegedly in an effort to save space. Later, the ridiculousness of the explanation became apparent during cross-examination. It was then established that through all his efforts Haywood saved approximately six inches of space in an 8'x15' storeroom (R. 1527-1528; A. 783).

Worksheets and position cards were records kept by Baggot and Morrison in order to record changes in their traders' open positions. The worksheet was designed to record the actual positions. The worksheet was designed to record the actual daily transactions and the opening

position for the day at the top and the subsequent closing position for the day at the bottom.

All the worksheets supplied by Baggot and Morrison were also prepared a few days prior to the October 12, 1960 arbitration hearing and they were self-manufactured because Baggot and Morrison had on their books 140 accounts (R. 187; A. 346), and none of the worksheets showed more than approximately 60-65 customers. Therefore, approximately 75-80 accounts are missing.

Notwithstanding the defendants' manipulation of the records, indications of their fraud filtered through in many instances in the records which were produced. For example, discrepancies between the worksheet and the position cards received by plaintiff clearly showed the fraudulent treatment of his account and the intention of defendants to present what was the true position to the plaintiff while fraudulently altering other records as to his position through the entries on their worksheet.

In short, the evidence showed beyond a doubt that defendants altered, concealed, lost or destroyed the records which would determine one way or the other just what they claim plaintiff's position was which led to his loss of membership in the Chicago Board of Trade, and the only definitive method by which plaintiff could determine his true position.

It should also be noted that since the Appellate Court's decision, further proceedings were commenced by petitioner under Section 72 of the Illinois Civil Practice Act to re-open the case for consideration of newly-discovered evidence which had been fraudulently concealed by the defendants and in view of forged documents which were used to take his membership away which deprived him of his means of livelihood and forced him to go on public

welfare. For this Court's benefit, a portion of the brief which was subsequently filed in the Appellate Court arising out of the Section 72 proceedings is submitted herewith as Appendix "B", setting forth these additional facts and evidence. At the present time, this matter is pending before the Illinois Appellate Court.

Moreover, on May 17, 1977 and June 21, 1977, in further proceeding in the trial court, Judge Nathan Cohen ordered the Board of Trade to produce certain records which would exonerate petitioner once and for all. The records have not been produced to date.

FINDINGS BY THE TRIAL JUDGE

The trial court recognized the situation created by defendants' concealment and alteration of the records. It became clear that the material original documents were not produced at trial and that within those records which were submitted serious inconsistencies existed exposing the fraud. By the end of the case, the defendants' fraud on the plaintiff was shockingly clear. The trial had been necessarily long because defendants suppressed those records which would have effectively determined the underlying issues. There was only one conclusion possible and this was derived for the most part from the records or lack of them in this case. The trial court's comments are noteworthy (R. 3973):

> I have analyzed the issues. The gentlemen you represent were thoroughly dishonest. They secreted records. They suppressed records. They altered records. That is just as clear as anything that ever happened. There is nothing that you or anybody else can say to change the record in this case and it's based upon the records that I will make my ruling.

The Appellate Court ignored these findings.

FINDINGS OF THE APPELLATE COURT

In reversing the judgment of the trial court, the Appellate Court held that:

1. The litigation before the trial court was concerned with the identical factual situation which was considered by the Arbitration Committee of the Board of Trade; *i.e.*, the basic factual issues in both proceedings centered on the alleged fraudulent manipulations of petitioner's accounts and records in possession of Baggot and Morrison so as to create a fabricated and false indebtedness for petitioner to that firm.
2. The Arbitration Committee of the Board of Trade and Board officials were not guilty of any "conspiracy, partiality or other misconduct."
3. Baggot, Morrison and Haywood did not obtain the arbitration award by fraudulent means (a finding totally contrary to that made by the trial judge).
4. Since (in the Appellate Court's opinion) the arbitration award against petitioner was not obtained by fraudulent means, the arbitration proceedings and award were dispositive of plaintiff's claims. "Under the circumstances," stated the Appellate Court, "neither the trial court nor this court has the authority to make any disposition of the rights of plaintiff and Morrison other than that reached in the award issue by the Committee of Arbitration and duly affirmed by the Committee of Appeals."

With respect to Baggot and Haywood, who were not parties to the arbitration proceeding, the Appellate Court found—contrary to overwhelming evidence and the trial

judge's findings of fact—that "neither Baggot nor Haywood committed fraud of any kind or participated in a conspiracy which would serve as a proper basis for liability to plaintiff." In so doing, the Court disregarded all of the evidence relied upon by the trial court, including the devastating testimony of defendant Haywood, as well as a letter written by Haywood to petitioner, and admitted in evidence in which Haywood asked petitioner's forgiveness for his actions. To appreciate the full impact of the Court's action in this regard, it should be noted that *four years* after the trial, and *four days* prior to oral argument in the Appellate Court, new counsel for the defendant Haywood, who were formerly members of the firm representing the Board of Trade defendants, presented a petition to the Appellate Court, unsupported by affidavits of any medical persons, claiming that the defendant Haywood was insane at the time he gave his testimony at the trial. In May 1974, when Haywood obtained leave of the Appellate Court to adopt the briefs of the co-defendants, no such claim of mental incompetency was made. During the trial of this cause, Haywood was represented by competent counsel, and no claim of mental incompetency was even alleged.

In disregarding Haywood's testimony and the trial judge's findings of fact (which, as previously noted, found the conduct of these defendants so egregious that substantial punitive damages were assessed), the Appellate Court made an incredible and dispositive finding of fact that Haywood was "an unsatisfactory witness not from malicious motives or with fraudulent intention, but simply because of his own mental weakness, probably associated with alcoholism."

ARGUMENT

I.

THE APPELLATE COURT'S DECISION DENIED PETITIONER DUE PROCESS OF LAW BY HOLDING THAT ISSUES DECIDED BY THE ARBITRATION COMMITTEE WERE CONCLUSIVELY RESOLVED AND WERE NOT SUBJECT TO CONTRARY DETERMINATION BY THE TRIAL COURT.

Rule 130 of the Board of Trade provides *inter alia*:

> SUSPENSION FOR DEFAULT—Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, *the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied* . . . If the member alleged to be in default denies the default, he shall be entitled to have the claim arbitrated. . . . [Emphasis Supplied.]

Thus, under Rule 130, the only remedy provided a defaulting member is arbitration, and even then he is suspended or subject to suspension until the claim is arbitrated. This system does not offer a voluntary choice to submit the controversy to arbitration. Quite clearly, petitioner was obliged to engage in mandatory arbitration under Rule 130. In addition, the mandatory nature of the Rule violates Section 7 of the Legislative Act to Incorporate the Board of Trade, adopted by the Illinois Legislature in 1859, providing as follows:

> Section 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations, or By-Laws for the settlement of such matters of difference as may be *voluntarily submitted for arbitration* by members of the

> Association, or by other persons not members thereof; . . . [Emphasis supplied.]

In petitioner's view, the Appellate Court's decision denied him due process of law in rejecting the trial court's decision, and deprived petitioner of his constitutional right to litigate his claims, on the stated ground that the arbitration "award should have all the force of any other legal adjudication so as to preclude the parties thereto from further litigation upon the same matters." The error of this finding is four-fold:

First, it is based upon the Appellate Court's determination—finding of fact—that "plaintiff was fairly treated by the Committee of Arbitration as regards Board rules and principles of due process and fundamental fairness. Plaintiff was not prejudiced by failure of the Committee to require mass production of all books, papers and records of every kind", and the Court's further finding of fact that "plaintiff was not deprived of due process in any respect at the arbitration hearings but, on the contrary, the hearings were conducted by the Committee with fairness and impartiality." These findings of fact were made in the face of the trial judge's findings after considering substantial evidence, that the arbitration proceedings were "travesty".

Second, since the plaintiff was compelled to seek arbitration, the resort to arbitration cannot constitutionally be relied upon as a basis for barring judicial redress of the grievances considered by the arbitrators. Third, the use of mandatory arbitration is a violation of the Illinois Act under which the Board of Trade is chartered. Such a violation of the Charter, governing procedure and jurisdiction of the Arbitration Committee, is itself sufficient

to set aside the award granted Morrison in this case. As was stated in *Ryan* v. *Cudahy,* 157 Ill. 108, 119 (1895), a similar case concerning the validity of an arbitration award granted by the Board of Trade:

> [The Arbitration Commitee] may be regarded as a tribunal of limited jurisdiction, and they are bound to proceed in conformity to the rules under which they were selected, and if they failed to conduct the investigation in accordance with the charter and by-laws of the Board of Trade, under which they were appointed, the complainant ought not to be bound by their judgment.

Thus, reliance upon the arbitration proceedings as a bar to common law relief further violated petitioner's right to due process.

Fourth, the arbitration proceedings simply did not provide the rudimentary rights and protection required by due process of law. Records requested by petitioner were not produced, despite promises that they would be. Petitioner was not allowed to be represented by counsel; Morrison was represented by an experienced trial lawyer. The Committee refused to allow petitioner to subpoena books and records needed to refute Morrison's claim. The Committee received evidence outside petitioner's presence. The Committee refused to allow petitioner to file a counterclaim.

Petitioner states that the day the Board of Trade of the City of Chicago, or for that matter *any Board,* was able to expel a member by "kangaroo court" or "Star Chamber" proceedings is over. With the advent of decisions such as *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) and *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), these so-called voluntary associations, with marriages of convenience with the pertinent governmental agencies, no longer are fiefdoms to themselves. No longer can a member be treated as plaintiff was treated in this case without suffering scrutiny of a court of equity.

Of particular significance to the instant case is *Deakton* v. *L. D. Schreiber & Co.,* 479 F. 2d 529 (7th Cir. 1973), where the Seventh Circuit sustained a cause of action by a member against his board of trade (The Chicago Mercantile Exchange) and other defendants alleging damages as a result of the board's violation of Commodity Exchange Act rules and the rules of the board itself. The following statement of the Court has particular significance [479 F. 2d, at 534]:

> There remains the question whether private damage actions are allowable under the Commodity Exchange Act. As noted earlier, no express provision is contained in the Act. The courts which have considered the question, however, have apparently uniformly concluded that such an action exists. *E.g.,* Booth v. Peavey Co Commodity Services, 430 F.2d 132 (8th Cir. 1970); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F.Supp. 764 (S.D. N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F.Supp. 1338 (E.D. La. 1972); United Egg Producers v. Bauer Int'l Corp., 311 F.Supp. 1375 (S.D. N.Y. 1970); Anderson v. Francis I. duPont & Co., 291 F.Supp. 705 (D. Minn. 1968); Goodman v. H. Hentz & Co., 265 F.Supp. 440 (N.D. Ill. 1967); 1 Bromberg, Securities Law: § 4.6 (353) (1971). The rationale was stated in *Goodman, supra,* 265 F.Supp. at 447:
>
> "Violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect. Restatement, Torts, Section 286."

The purpose of the Commodity Exchange Act has been stated to be "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 Geo.Wash.L.Rev. 215, 223 (1958). It is a felony under 7 U.S.C. § 13(b) of the Act to manipulate or attempt to manipulate the price of any commodity or to corner or attempt to corner any such commodity. We think the enactment is at least in part intended to protect the interests of the plaintiff-traders in these actions. We therefore hold that a private cause of action exists under the Commodity Exchange Act in favor of the plaintiffs in these actions and that the district court was correct in permitting the plaintiffs to maintain their actions under the Commodity Exchange Act.

It is too clear for discussion that the Record shows that he did not receive a fair hearing before a fair committee, as Due Process requires. *Re Murchison,* 349 U.S. 133, 136. Even the semblance of justice was denied him.

The right to earn a living is protected by the guaranties of the Fourteenth Amendment, and is the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. It means he can eat. That fundamental right has been denied the plaintiff by the alleged fraud, collision and arbitrariness of the defendants. His sole means of support was taken from him.

A membership on the Board of Trade is also property. *Board of Trade* v. *Johnson,* 264 U. S. 1; *Weaver* v. *Fisher,* 110 Ill. 152, 153.

The right to earn a living is also protected by the Civil Rights Statutes, if one is deprived of that right under color of State action. 28 U. S. C. 1343; 42 U. S. C. 1983.

It therefore becomes essential to determine whether the award of the Arbitration Committee, affirmed by the Committee of Appeals, and leading to the plaintiff's suspension, and endorsed by the Appellate Court contravened fundamental rights.

Section 1 of the Legislative Act incorporating the Chicago Board of Trade limited its right to make Rules, Regulations and By-Laws for its government to those "not contrary to the laws of the land." That term is synonymous with "due process of law." 24 Words & Phrases (Perm. Ed.), p. 427.

Yet for over half a century, the Supreme Court of Illinois in an unbroken line of decisions has refused to interfere with the awards leading to membership suspension of the Committees of the Board of Trade for any reason whatsoever, either in equity or at law. *Board of Trade* v. *Nelson,* 162 Ill. 431, 439; 44 N.E. 743, 745; *Fisher* v. *Board of Trade,* 80 Ill. 85, 87; *Bostedo* v. *Board of Trade,* 227 Ill. 90, 91, 81 N.E. 42, 43; *People ex rel. Page* v. *Board of Trade,* 45 Ill. 112, 116, 118; *People ex rel.* v. *Board of Trade,* 80 Ill. 134, 137; *Baxter* v. *Board of Trade,* 83 Ill. 146, 149; *Sturges* v. *Board of Trade,* 86 Ill. 441, 442; *Pitcher* v. *Board of Trade,* 121 Ill. 412, 419, 421; 13 N. E. 187, 188, 189; *Pacaud* v. *White,* 218 Ill. 138, 147, 148; 75 N. E. 779, 781, 782.

The Appellate Court here adhered to that reasoning.

The reasoning is that by becoming a member, that person had voluntarily submitted himself to the operation of the Legislative Act and the rules adopted pursuant there-

to; that he had thereby made a valid and binding agreement to submit questions in dispute connected with his membership to arbitration, which the courts were powerless to interfere with; and that the Board of Trade having been empowered by its charter to act judicially, its sentence was just as conclusive as that of any other judicial tribunal.

It was even held that if the member had no notice of the hearing and had been unjustly suspended, a court of equity could not reinstate him, because "the action of the Board is final and complete, and if it has erred in that action either on the merits or has acted in a case without jurisdiction, chancery cannot afford a remedy." *Fisher* v. *Board of Trade,* 80 Ill. 85, 87.

So unique are these decisions that they were characterized as "*sui generis.*" *Hill* v. *Mercury Record Corp.,* 26 Ill. App. (2) 350, 361; 168 N.E. (2) 461, 466.

The law has always been in the case of other voluntary associations that their determinations are accepted as conclusive "in the absence of fraud, collusion or arbitrariness." *Gonzales* v. *Roman Catholic Archbishop,* 280 U.S. 1, 16, 17.

It may be conceded that the petition, when he became a member, agreed to abide by *lawful* rules, which were "not contrary to the laws of the land." But so did Baggot and Morrison, and the members of the Committees, and the officers and directors of the Board of Trade. If they had conformed to *lawful* rules, then it may be insisted that the plaintiff should have conformed also; but when they arbitrarily and capriciously violated them, it cannot in justice be claimed that he should be bound by their decision. Rule 187 also required the Arbitration Committee to render its award "according to the laws of the land."

Yet the plaintiff is denied access to the State courts by the Illinois decisions, even though "the laws of the land" were flagrantly violated by those in control.

The Illinois decision overlooked the rule that no matter what the parties agreed to, they cannot oust the courts of their jurisdiction. Regardless of their agreement, parties, in accordance with constitutional guaranties, must have available to them at some point an impartial look by an impartial court at an award made through arbitration, which, they may claim, denies them substantial rights because of fraud, collusion or arbitrariness.

They cannot under those circumstances control, limit, waive, or bargain away all judicial remedies, because such agreements are contrary to public policy. *McCullough* v. *Church-Mitchell Const. Co.,* 71 F. (2) 17, 21, C. A. 8; *Guaranty Trust Co.* v. *Green Cove Railroad,* 139 U.S. 137, 142, 143; 6 A Corbin on Contracts (1962) p. 386, sec 1432.

This is particularly true of compulsory arbitration, which is what Rule 130 really provides. *Mengel* v. *Nashville etc. Union,* 221 F. (2) 644, 647, C. A. 6; *Chas. Wolff Packing Co.* v. *Court of Indust. Relations,* 262 U. S. 522, 544; *Dorchy* v. *Kansas,* 264 U. S. 286; *Re Smith,* 381 Pa. 223, 230; 112 Atl. (2) 625. Compare *Cocalis* v. *Nazlides,* 308 Ill. 152, 158; 139 N.E. 95, 98 (still defending at p. 157 the Board of Trade decisions as an exception to the rule).

Courts of equity have traditionally entertained jurisdiction to restrain the enforcement of arbitration awards in cases of fraud, corruption or where it would be against conscience to enforce them. 6 C. J. S. p. 256, sec. 109; 6 A Corbin on Contracts (1962) p. 417, sec. 1439.

The history of the United States Supreme Court has been one of ever increasing opposition to the concentration of uncontrolled power in the hands of those in control. It has repeatedly taken cognizance of the unfortunate consequences that ensue when those in control are immunized from attack because of their misconduct.

The legal obligation or duty of fairness and impartiality was *implied* in the Railway Labor Act. *Steele* v. *L. & N. R. Co.*, 323 U. S. 210, 213. Otherwise, the Court said, the minority would be left with no means to protect their interests, or indeed, their right to earn a livelihood, and constitutional questions would have to be decided.

Mr. Justice Murphy's concurring opinion, 323 U. S. 192, 208, pointed up the situation clearly when he said:

> "While such a union is essentially a *private* organization, its power to represent and bind all members of a class or craft is derived solely from Congress. * * * But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality * * *." (Italics ours.)

This view applies with equal force here. By the power of the Board of Trade to make rules and to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, it cannot be assumed that the Illinois legislature meant them, that is, those in control, to act so as to ignore rights guaranteed by the Constitution, or as the Act itself says, "not contrary to the laws of the land".

The rule we contend for, and which the Supreme Court of Illinois seems to have overlooked, was applied to the "final and binding clauses" contained in arbitration contracts between management and union pursuant to the Railway

Labor Act. System Boards of Adjustment are created by *private* contract making their awards "final and binding". The federal courts, including this Court, have held that such contracts cannot make the award of such Boards immune from judicial examination where arbitrary and capricious action, or bias and prejudice of the arbitrators, were alleged. *Arnold* v. *United Air Lines*, 296 F. (2) 191, 193, C. A. 7; *Ellerd* v. *Southern Pac. R. Co.*, 241 F. (2) 541, 544, C. A. 7; *Edward* v. *Capital Air Lines*, 176 F. (2) 755, 760, 761; App. D. C.; cert. den. 338 U.S. 855.

The Illinois decisions not only deny due process; they deny equal protection of the laws. Section 8 of the Legislative Act incorporating the Chicago Board of Trade permits the filing of the award in the Circuit Court with all the force and effect of a judgment and authorizes the issuance of an execution thereon. The alleged debtor's assets are subject to sale; but the Illinois decisions deny him access to the same court to resist the same, even though his constitutional guaranties have been sacrificed in the process.

The Illinois decisions have allowed the unfortunate victim to be tried by an agency clothed with power so uncontrolled and so devoid of standards or guides (compare Uniform Arbitration Act, 1 Ill. Rev. Stat. 1961, Ch. 10, Secs. 105-115), that it is in effect an agency with the power of life or death over the economic existence of the person claimed against, with his hands tied behind him.

Thus, the highest court of the State of Illinois says in effect: "Yes, it may be that the hand-picked Committees of the Board of Trade arbitrarily deprived a member of his sole means of support, his property, and his reputation, but the courts of Illinois can do nothing about it." Such a rule of law, by denying all relief from arbitrary power and discriminatory action, implicitly sanctions them:

and deprivations of interests that are part of a man's life, liberty and property, when based on such grounds, contravene Due Process. See Mr. Justice Frankfurter's dissenting opinion, *Barsky* v. *Board of Regents of N. Y.*, 347 U.S. 442, 469; *Trax* v. *Raich*, 239 U. S. 33, 38.

It has been the constant ruling of the United States Supreme Court that the action of the State to which the Fourteenth Amendment has reference, includes action of the State courts and State judicial officials. The federal guaranty of Due Process extends to State action through its judicial as well as through its legislative, executive or administrative branches. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673; 680; *Shelley* v. *Kraemer*, 334 U. S. 1, 14, 15, 17, 18; *Barrows* v. *Jackson*, 346 U. S. 249, 254.

In the *Brinkerhoff-Faris Co.* case, p. 682, the Court said:

> "Whether acting through its judiciary or through its legislative, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The State of Illinois, by the actions of its legislature and its judiciary, has created a corporation with powers that are repugnant to the Federal Constitution. That cannot be done. *Phillips Petroleum Co.* v. *Jenkins*, 297 U.S. 629, 634.

The fact that this action was not instituted in the State court and a decision of the Illinois Supreme Court secured first, does not militate against federal jurisdiction. *Doud* v. *Hodge*, 350 U. S. 485, 487.

The United States Supreme Court said many years ago that "the nature and theory of our institutions of government * * * do not mean to leave room for the play and

action of purely personal and arbitrary power. * * * For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 370.

Clearly, the use of the arbitration proceeding as a basis for denying petitioner a right of action constituted a denial of due process.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE APPELLATE COURT'S SUBSTITUTION OF ITS FINDINGS OF FACT FOR THOSE OF THE TRIAL JUDGE.

The extent to which the Appellate Court disregarded the findings of fact reached by the trial judge based as they were on substantial evidence, constituted a clear violation of petitioner's right to trial and violated the Due Process clause of the Fourteenth Amendment.

This case was tried by an experienced, able and thorough irial judge who personally heard all the testimony and reviewed all the exhibits. The Supreme Court of Illinois, in speaking of findings of a master in chancery, has stated the universal rule in *Horan* v. *Blowitz*, 13 Ill. 2d 126, 148 N.E. 2d 445, 449 (1958):

> "Although the testimony presented conflicted in many details, the master spent considerable time in observing the witnesses and in preparing the findings which were approved by the chancellor. We have long held that such findings are entitled to great consideration and will be disturbed only if manifestly against the weight of the evidence. *Finely* v. *Filter*, 403 Ill. 372; *Hopkins* v. *Austin State Bank*, 410 Ill. 67."

Plaintiff submits that if such weight is to be given the findings of a master in chancery, then surely the findings of an experienced trial judge are to be given equal weight. As the proceedings below involved countless numbers of business records, often with several witnesses testifying extensively on each such record, it is proper that the superior position of the trial judge be given substantial consideration upon review where it is alleged that the findings are against the manifest weight of the evidence.

It is elementary that where, as here, the validity of business records is disputed, the issue will be determined by the testimony of various witnesses.

It would be a hollow right, indeed, to suggest that a party may have redress to the courts to vindicate his rights, but that the findings therein made can be flagrantly disregarded in favor of the opposing party. The extent to which this occurred in the instant case can only be fully presented in full briefs before this Honorable Court.

CONCLUSION

It is respectfully submitted that, for the reasons herein stated, a Writ of Certiorari should issue to the Supreme and Appellate Courts of Illinois and that this case should be reviewed in full by this Honorable Court.

Respectfully submitted,

WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illinois 60602
Attorney for Plaintiff-Petitioner.

77-1867

No.

Supreme Court, U. S.
FILED
JUN 30 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1976

BERNHARD ROSEE,

Plaintiff-Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIRBY and SAM GORDON,

Defendants-Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS

William J. Harte, Ltd.
111 West Washington Street
Chicago, Illinois 60602
Attorney for Plaintiff-Petitioner

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

Appendix "A"

Opinion of the Appellate Court 1a

Denial of Petition for Leave to Appeal by Illinois Supreme Court 68a

Order extending time to file Petition for Writ of Certiorari in United States Supreme Court 69a-70a

Appendix "B"

Brief before the Illinois Appellate Court 71a

APPENDIX "A"

Mr. Presiding Justice Goldberg delivered the opinion of the court:

After a lengthy and complicated hearing before the circuit court without a jury, Bernhard Rosee (plaintiff) recovered a judgment for actual damages of $999,139.42 against Baggot, Morrison and Haywood, jointly and severally; and judgments for exemplary damages of $150,000 each against Morrison and Haywood. At the close of plaintiff's case, the trial court entered a judgment in favor of the Board of Trade of the City of Chicago, an Illinois corporation (Board), six individuals constituting members of the Committee of Arbitration of the Board and a number of other individuals who were officials of said Board. Defendants Baggot, Morrison and Haywood filed separate notices of appeal. Plaintiff appealed from the judgment in favor of the Board and the various individuals associated therewith. With leave of court, defendant Haywood has adopted the briefs of Baggot and Morrison and has also filed a brief of his own. We will consider all of these appeals in this opinion.

In this court, defendant Morrison urges that the defendants did not receive a fair trial so that the judgment against him must be reversed; the trial court misapprehended the meaning of margins and the settlement process as applicable to Board of Trade transactions; the judgment is not justified by the evidence; an award made by the Committee of Arbitration of the Board is final in the absence of fraud; plaintiff failed to sustain his burden of proving fraud and that the trial court erred in awarding damages to plaintiff upon a remote,

conjectural and speculative basis. In this last contention, Morrison deals with the status of Rosee's account with Baggot and Morrison (B & M); the alleged loss of profit by plaintiff; the value of plaintiff's Board of Trade membership and the allowance of punitive damages.

In his separate brief, Baggot urges that plaintiff failed to prove by clear and convincing evidence that Baggot conspired to remove plaintiff from membership on the Board of Trade or otherwise engaged in fraudulent conduct resulting in damage to plaintiff. In this section of his argument, Baggot contends that the evidence clearly established that he was not part of any conspiracy to deprive plaintiff of his membership; the evidence established that Baggot could not have profited from the fraudulent conduct he was charged with; by his conduct plaintiff admitted that he was indebted to B & M; the evidence demonstrated that account No. 35 belonged to plaintiff; the accuracy of records maintained by B & M and the validity of a claim prosecuted by Morrison against plaintiff before the Committee of Arbitration were confirmed by independent investigations made by experts in the field of commodity trading and that the evidence upon which plaintiff relies is weak and misleading. Baggot also contends that the award of the Committee of Arbitration was final and decided the entire controversy; the trial court erred in interfering with this award in the absence of proof of extrinsic fraud and the trial court improperly awarded speculative, remote and uncertain damages. In this final point, Baggot considers the alleged net equity position in plaintiff's account with B & M, plaintiff's alleged loss of profits and the loss of plaintiff's membership on the Board of Trade.

Plaintiff has filed an answer to the separate briefs of defendants Baggot and Morrison. By way of introduction, plaintiff sets forth the proper standard for review; the existence of a fiduciary relation between plaintiff and defendants and the proof required to establish fraud and conspiracy. Plaintiff maintains that defendants improperly relied on an opinion rendered by a judge of the United States District Court for the Northern District of Illinois, Eastern Division. Plaintiff then urges that the overwhelming weight of the evidence supports the judgment of the trial court against Baggot, Morrison and Haywood; the arbitration proceedings before the Board were a sham and that there was no trial error which would warrant a new trial. In this connection plaintiff disputes the contentions that the trial court was prejudiced against defendants and failed to understand margins and the settlement process and plaintiff contests the argument raised by defendants regarding the length and lack of continuity in the trial proceedings. Plaintiff finally defends the award of damages on the ground that this result was founded upon a firm evidentiary basis and was not palpably erroneous.

Plaintiff has also filed a separate brief in connection with his appeal from the final orders dismissing James J. Coughlin, the Board of Trade, its officers and members of its Committee of Arbitration. Plaintiff here urges that he established a prima facie case against the Board defendants and that the arbitration proceedings were conducted in an arbitrary and illegal fashion so that the decision of the Committee of Arbitration as confirmed by the Committee of Appeals of said Board of Trade was void and illegal.

The Board and remaining associated individuals in response to plaintiff's brief contend that plaintiff has shifted his theory on appeal and that he has failed to show by clear and convincing evidence that the Board defen-

dants conspired and committed acts of fraud against him. These defendants further urge that the judgment in their favor is not manifestly contrary to the weight of the evidence so that it should be affirmed; plaintiff's contentions that the arbitration proceedings were a sham and illegal are without merit; the judgment in this regard is supported by the weight of the evidence; there is no evidence of conspiracy or fraud on the part of the Board and the individuals and plaintiff has no claim against them even if the arbitration award were erroneous. These defendants finally contend that plaintiff has admitted that he produced no evidence against them at trial.

Our study and analysis of the voluminous record and consideration of all of the arguments raised by counsel have convinced us that we need not pass upon each and all of the contentions above outlined to reach what we believe to be a proper disposition of this appeal. However, a recital of the pertinent facts is essential.

Plaintiff has been a trader in commodities since 1925. He has had considerable trading experience in commodities on various exchanges in New York City, in Liverpool and London, on the Winnipeg Grain Exchange and on the Chicago Board of Trade. He has been a member of the Board of Trade since 1944. The defendants Baggot and Morrison were members of the Board and their partnership, known as Baggot & Morrison (B & M), was a clearing member of the clearing corporation of the Board. During all times material hereto, commencing about March 1958, plaintiff did business with B & M who cleared his trading transactions. Defendant Harris Haywood was employed by B & M and, starting in 1958, acted as office manager.

Plaintiff alleged in his complaint filed in the circuit court that his membership in the Board gave him various valuable rights and privileges including the right to pay a far lower commission for his trades than would be charged in corresponding transactions carried out for nonmembers of the Board. Plaintiff also alleged that, commencing during 1956, certain defendants (Julius Mayer, Thomas E. Hosty, Wilbert E. Huge, Robert L. David, Robert C. Liebenow, Warren W. Lebeck) entered into a conspiracy with the Board for the purpose of depriving plaintiff of his membership in the Board and destroying his business and livelihood. Plaintiff alleged that in 1959 the defendants Baggot, Morrison and Haywood, and other unknown persons, joined in this conspiracy and broadened its scope to include the embezzlement and conversion of plaintiff's funds. The complaint described various overt acts allegedly performed in furtherance of the conspiracy including the charge that defendants knowingly caused a false claim to be filed against plaintiff with the Board of Trade and then compelled plaintiff to submit to proceedings before the Committee of Arbitration.

Plaintiff alleged that the individual defendants comprising the Committee of Arbitration (Sidney C. Hamper, Martin H. Milek, Roy C. Loftus, Richard Rose, Raymond A. Comenzo and Thomas E. Herr), along with Board member James J. Coughlin, also joined in this conspiracy about July 1960 and that they performed various overt acts alleged in the complaint. The complaint alleged that these defendants caused an award to be entered against plaintiff in favor of defendant Morrison which they knew was false and fraudulent. As a result of this award, plaintiff's membership privileges were suspended and, in July 1963, his membership in the Board

was sold by the defendants. Plaintiff claimed damages of $44,537.75 allegedly owed to him by the firm of B & M, $8800 as the value of his membership in the Board, and also profits of $300,000 which he would have earned during his natural life expectancy, together with punitive damages of one million dollars.

In a second count to the complaint, plaintiff further alleged that the claim filed against him by defendant Morrison was known by said defendant and by the arbitrators to be false and fraudulent but that the claim was submitted to arbitration pursuant to Rule 130 of the rules and regulations of the Board. Plaintiff alleged that the arbitration proceedings and the ensuing award were unlawful and therefore wholly null and void for various specified reasons. Plaintiff alleged that after the award had been made he appealed to the Committee of Appeals of the Board which affirmed the award. This decision was alleged to be unlawful. Plaintiff sought a declaration that the award, his suspension and the sale of his membership in the Board, were unlawful, null and void. Plaintiff prayed allowance against the Board and the individual defendants associated therewith of the same amount of damages and punitive damages claimed in the first count of the complaint.

This complaint was filed in the circuit court on July 12, 1963. Prior thereto, after denial of plaintiff's appeal by the Committee of Appeals (on February 15, 1961), plaintiff filed other proceedings in the circuit court (then the superior court) and in the United States District Court for this district. The various appeals taken after the disposition of this other litigation were resolved adversely to plaintiff. Plaintiff had originally joined as defendants in his complaint in the circuit court, two individuals, Albert W. Kibby and Sam Gordon, who were agents and

employees of the Commodity Exchange Authority of the United States. As will later be shown, this agency had made an audit of the Books of B & M. Plaintiff's complaint had alleged that the defendants Kibby and Gordon had refused to take action even though they had full knowledge that B & M had converted plaintiff's funds and charged trades made by other persons to plaintiff's account.

The United States Attorney appeared in circuit court in behalf of defendants Kibby and Gordon. On his motion the cause was removed to the United States District Court, Northern District of Illinois, Eastern Division. After extensive discovery in that court, a motion for summary judgment was made in behalf of defendants Kibby and Gordon. On June 13, 1966, the court entered an order granting the motion of said defendants for summary judgment. This was done on the theory that the record did not disclose any basis for asserting a claim against the United States or any facts which would give rise to an action against Federal officials. In a lengthy opinion the district court expressly refrained from passing on other issues presented by the pleadings and, under principles of limited Federal jurisdiction, remanded the balance of the cause to the circuit court.

In this court, defendant Morrison in his brief quoted portions of the opinion of the district court. He filed an appendix to his brief which included, as the first 78 pages thereof, a copy of the opinion of the district court. In plaintiff's brief he described the use of the district court proceedings as "an apparent flagrant attempt to prejudice" this court. Plaintiff submitted that any reference to the opinion of the district court was unwarranted and would "unduly mislead this Court."

Subsequently, plaintiff filed a written motion requesting the court to take judicial notice of an order entered in the proceedings in the district court on June 24, 1976. This order contained a supplemental finding modifying the district court's opinion in support of the remandment order entered ten years earlier and was entered "for the limited purpose of amending said opinion to clarify the original finding***." In the order, the district court stated that the deficits of plaintiff referred to in the court's original opinion were contained in and based upon a false and fraudulent document tendered to the court by the government. There was no finding or showing that defendants participated in the preparation or submission of this document.

Plaintiff also filed a motion that this court take judicial notice of a transcript of proceedings, a copy of which was appended to the motion. These proceedings consist of 116 pages of typewritten material certified by the official court reporter for the United States District Court, reflecting extensive argument of counsel and some testimony submitted to the district court on October 17, 1973, which resulted in the entry of the aforesaid order on June 24, 1976. Defendants Baggot and Morrison filed objections to these motions. Thereafter plaintiff filed a supplemental brief in response to the objections of these defendants.

By these latest documents the positions of counsel became completely reversed. Defendants now take the position that this court should not consider the tendered transcript of proceedings before the district court on October 17, 1973, or the order entered June 24, 1976. On the other hand, plaintiff now contends that this court should consider the subsequent statements made by various counsel to the district court as reflected in the tran-

script as well as the subsequent order entered by the district court. We have examined this entire mass of material and the legal arguments advanced by counsel.

The entire opinion of the district court was directed to the issue before that court as to whether the motion of the defendants Albert W. Kibby and Sam Gordon for summary judgment should be granted. As shown, the district court granted this motion and then, acting upon proper principles of limited Federal jurisdiction, expressly abstained from passing upon any of the remaining issues in the case which were later heard in the circuit court and are presently before this court. The district court simply remanded the cause to the state court. The proceedings held in the district court on October 17, 1973, and the order of modification entered on June 24, 1976, were both entered long after the proceedings in the circuit court had been completed. It is, therefore, our duty simply to review the result reached by the circuit court in accordance with the law of Illinois. In so doing we will neither consider nor be influenced by any of the proceedings taken or orders entered in the United States District Court.

As another preliminary matter, we note that, in the separate brief filed by defendant Haywood pursuant to permission from this court, he raised the point regarding his alleged lack of mental competency. This brief described the testimony of Haywood in the circuit court as being contradictory and confused and took the position that a hearing should have been conducted regarding his competency. The brief also urged that the issue of Haywood's competence had not been waived. Plaintiff has filed a response to this brief stating in strong language that the issue of competency has been waived and that it was never presented to the trial court through

the entire trial proceedings. As will later appear, the view which we take of this entire record and the result which will be stated in this opinion make it unnecessary for us to consider these contentions.

As another preliminary matter, it is necessary that we state a summary of the esoteric facts relating to the operation of the Board of Trade and the business of B & M in relation to the activities of traders such as plaintiff. Futures contracts are originally bought and sold by word of mouth complemented by a series of hand signals transmitted upon the floor of the exchange by various traders. These futures contracts, originating as verbal agreements, are initially recorded on trading cards. Each trader has a trading card for each day upon which he lists all completed transactions. The cards are printed on both sides. One side is blue for recording of purchases of futures contracts and the other side is red for listing sales. If properly filled out and completed, the card should show as to each and every transaction the name of the executing trader, the number of bushels involved, the grain or other commodity involved, the maturity month of the contract in question, the price, the name of the firm which is the other principal in the transaction and the initials of the other brokers. A busy trader who engaged in a number of transactions might use more than one card. These cards are generally executed on the floor of the trading pit by both individuals and then are given to the clearing members of both of the individual traders. Thus the buyer and seller in any given transaction would each have a card, with information in one case on the red side and the other on the blue, reflecting the transaction. This practice is essential because every trade must be confirmed by two clearing members of the clearing corporation which is

operated by the Board. All of the trading cards are retained as a permanent record by the clearing firm. There is evidence that on busy days the firm of B & M might accumulate 60 or 70 of these cards.

In the usual course of business of B & M, at the close of trading each day information from the trading cards was transferred to work sheets and other accounting records. One type of work sheet shows individual traders by name or account number, the product involved in their futures contracts and the quantities held and traded. Every trader's open commodity positions as of the start of the day's trading session are listed at the bottom of this sheet for trades that had been cleared through B & M. The day's trades are all reflected in figures at the top portion of the sheet.

Every morning each floor trader was given a "position card" which reflected his open position, the quantity of each commodity that he held as an unliquidated trade. This position was either long or short, depending upon the status of the trader's account. Thus, a trader who had sold 100,000 bushels of soybeans on one day and had bought 50,000 bushels on that same day would have an open position in that he would still be 50,000 bushels short on soybeans. This information would be reflected on the position card.

In addition, every floor trader who dealt with B & M received a purchase and sales slip (P & S) which would reflect loss or gain on all completed transactions. Thus, floor traders would receive a P & S slip for every day upon which an open position was liquidated. Outside customers, who were not also floor traders, would receive monthly statements instead. These P & S slips were prepared in duplicate, one white and one pink. They were

originally bound together in a book. The white original was removed and given to the trader and the pink copy remained bound in the book.

In due course all of the information from the trades would be posted in other accounting records such as a street book and a position journal. The street book had records divided according to the commodity which would show the quantity involved in the transaction, the price, the other clearing members involved in the transaction and the name of the person for whom the trade was accomplished so that in each instance both seller and buyer were necessarily identified. The position journal reflects the status of the account of each customer of the firm by listing each sale or purchase, identifying the commodity and reflecting the quantity and price in each instance. It was necessary for every participating firm, including B & M, to furnish the clearing corporation with complete information regarding price and amount involved as to every trade so that all trades by and through all members of the clearing corporation could be cleared at the close of each day.

A differentiation must be made between the clearing corporation itself and its clearing members. The corporation is an instrumentality of the Board of Trade. The clearing corporation in turn has a number of participating clearing members including all brokers, such as the firm of B & M, who handled Board of Trade transactions. Each open contract is held simultaneously by two opposite clearing members, one holding the selling or short position, and the other occupying the buying or long position. Each day, at the close of business, a settlement is made between the clearing corporation and each clearing member who held an open position or who participated in the market that day. The settlement is a cash

payment representing the difference between the day's closing market price for the particular commodity and the price at which the individual futures contract in that commodity was bought. The corporation collects this settlement amount from the clearing firm holding the position which lost value in relation to the closing market price and transfers this same amount to the firm occupying the position which increased in value. The clearing corporation thus acts as a conduit for these cash adjustments and ends its daily transactions with a zero cash balance. Clearing members whose accounts for the day show a profit receive payment that day. Clearing members presenting transactions which have resulted in losses are obliged to pay these amounts to the clearing corporation every day.

Other matters of importance regarding the record of B & M require attention. The firm maintained a ledger sheet for each account of every customer, showing the name of the trader, number of the account, the date of every transaction, the source of every entry such as the number of the P & S slip which reflected the transaction, the amount of debit or credit resulting from each transaction, and finally the current balance of the account, either debit to indicate a loss, or credit to reflect a profit. The firm employed several bookkeepers and all of the books were under the supervision of defendant Harris Haywood.

It is no exaggeration to state that the record shows that Haywood suffered from a devastating problem with alcoholism which in later years, after completion of all of the transactions here involved, resulted in a degree of impairment of his mental abilities. This case was tried in late 1971 and early 1972. Haywood was a patient at Hazelton Alcoholic Rehabilitation Institute in Minneso-

ta during spring and summer of 1971. Plaintiff and his attorney made a personal visit to Haywood during this time. The trial judge was aware of Haywood's infirmity and mental condition during the trial.

Commencing in 1959 the B & M firm adopted a system of maintaining two separate ledger sheets reflecting each customer account. One ledger was labeled as a trading sheet. It indicated the status of the trading account as above pointed out. The other ledger sheet maintained separate records of the so-called drawing account which reflected only cash amounts deposited to the account of the customer or cash withdrawn or debited to the account.

Haywood also maintained a memo ledger which was identical to the original trading and drawing ledgers kept by the firm's bookkeeper, Edwin Sprandel. Haywood testified that he needed up-to-date ledgers to record customer ledger balances on the daily position cards. The firm bookkeeper occasionally fell behind in posting entries in the B & M ledgers. Therefore, Haywood maintained a set of parallel ledgers which he kept current. The records kept by the firm bookkeeper were the official ledgers of B & M and other firm documents were based thereon. Both types of these ledger records were received in evidence. We will later have occasion for further consideration of this particular situation.

The accepted procedure of the Board of Trade concerning deposit of margins to secure trades in futures contracts requires consideration. The Board requires deposit of margins by clearing members in connection with operation of the clearing corporation. Margin requirements are based upon an amount for each bushel or unit of the commodity in question. The amount per bushel is

fixed by the board of governors and the so-called Margin Committee of the Board. The clearing corporation does not deal with individual traders but only with its own members such as B & M. A margin is not required to cover each and every trade but only the net positions of each clearing member at the end of each business day. As shown, the net long or net short position of each member of the clearing house is calculated at the close of each day and this is the amount to which the margin requirements pertain. In general practice, the required margin is not deposited with the clearing corporation each day but is deposited with area banks. These depositaries furnish evidence of the deposit of money or securities which stand to guarantee the margin requirement of the clearing member. In all cases the margins posted in this manner by the clearing members are a lump sum and they are not subdivided or designated with reference to the identity of any customer of the trading firm.

In compliance with Board rule, clearing members, such as the firm of B & M, required deposit of margins for security from their customers. But, the record shows definitely that members of the Board of Trade who engaged in individual trades for their own accounts were exempt from margin requirements. Thus, B & M did not require deposit of margins from plaintiff who was, at the time of his trading activities, a member of the Board. B & M was required to consider the daily net position of plaintiff in connection with any trades that he made in calculating the amount of its margin requirements in its daily reports to the clearing corporation. The firm could and did depend upon the equity and credit of plaintiff to make certain that trades which he made on his own account were adequately secured.

In this connection, a clear differentiation must be made between two types of records maintained by trading firms such as B & M. The customers' segregated funds account was the firm bank account in which funds deposited by customers were kept. For example, this account reflected total drawing account deposits and withdrawals as well as profits and losses from the daily settlement process with the clearing corporation. The account also served to segregate customer funds from those of the firm which were kept in a separate house account. The bank statements for this segregated funds account reflected total customer funds and did not contain names of individual traders or any itemized information regarding any single trade.

The second type of record, the daily segregation statement, was issued every day by all clearing members. The purpose of this record was to provide information as to the net amount of funds that the clearing member would owe all of its commodity customers on the date in question if all of them were simultaneously to liquidate their positions and demand payment of the net credits in their respective accounts. This statement also indicated the amount of money the firm had available to pay its customer equities as well as the location of those segregated funds. These Daily Segregation Statements did not reflect the commodity position or transactions of any individual customer. However, the statement would reflect the identity of each customer's account which had a net debit at the close of the market day.

The trading firm is required to segregate and have available sufficient assets to liquidate the account of every customer if required. Where the amount of customers' funds held in segregation by a firm does not contain sufficient cash and securities thus to liquidate

and pay each and all of its total customers' equities, the firm is said to be in an undersegregated condition. This requirement of segregation of funds has been established by Federal law. (See the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* (1958), *as amended* 7 U.S.C. §§ 1 *et seq.* (Supp. V, 1975).) Under the rules and regulations adopted pursuant to this statute, the making of these reports and the establishment and maintenance of the segregated fund in good order was a mandatory requirement. As will later be shown in detail, B & M did not comply with these requirements of the law. In addition, as we will later show, the Daily Segregation Statements which were required to be kept by them were never produced before the trial court.

It is undisputed that plaintiff was a customer of B & M commencing about January 1958 and continuing until the firm closed its doors in May of 1960. During the existence of this relationship, various transactions took place between plaintiff and B & M which were the subject of considerable evidence by both sides before the Committee of Arbitration and the trial court. We will next summarize the facts pertaining to these matters.

Plaintiff's Guarantors

From time to time, several persons deposited funds with B & M to guarantee plaintiff's transactions. On March 5, 1958, a friend of plaintiff named Bernard Shulman wrote to B & M. He requrested that the firm open an account in his name which would stand as a guarantee for the trading account of plaintiff up to and including the amounts on deposit in the guarantor account from time to time. A cashier's check for $10,393.17 was enclosed with the letter. This amount was reflected in the records of B & M as a credit to Shulman's drawing

account. Thereafter another check for $4000 was deposited in this account. Plaintiff testified that most of this money was the property of plaintiff's nephew, Fred Freigher, who had supplied the funds to Shulman. Only a small portion of the funds actually belonged to Shulman. However, Shulman made no trades in this account at any time and the funds were always retained to the credit of plaintiff.

A. L. Schiffman was another guarantor of plaintiff's trades. Schiffman wrote two letters to B & M, one on March 16, 1959, and one on June 22, 1959. In each of these letters a check for $3000 was enclosed. The first letter stated that the funds were to guarantee trades to be made by plaintiff in a special account that plaintiff would open with B & M. In the second letter, Schiffman stated that the entire $6000 "will guarantee any and all trades for Mr. Bernhard Rosee." Plaintiff testified that he had introduced Mr. Schiffman to B & M as a favor and that from time to time Haywood had requested plaintiff to execute various orders in behalf of Schiffman on the floor of the exchange. Plaintiff's ledger account as kept by B & M shows a debit of $6674.45 three days prior to the date of the earliest letter. Plaintiff's ledger debit about the date of the second letter was $4957.80. Plaintiff testified that his financial position at B & M was not in a debit condition when the first letter was received. He stated that he was going to enter the perfume business, he needed money for the purchase of oils and these deposits were only intended to be a reserve to protect plaintiff against fluctuations of the market in the event that he was away for a few hours. Plaintiff testified that he received this money from Schiffman, "like a loan"; he had borrowed the money and intended to pay it back.

There is a conflict in the evidence concerning an account carried by B & M under the name of Emil Acciari. Plaintiff testified that he introduced Acciari to the firm and that he never initiated or controlled any transaction for Acciari's account and did not pay any money to Acciari as a result of any trading transaction. Plaintiff stated that he had executed orders for trades in the Acciari account which he had received from the defendant Haywood. Haywood denied that he had ever ordered plaintiff to execute such trades and stated that he had never received a trading order from Acciari but that the account had been handled and controlled by plaintiff. Acciari testified that plaintiff had handled his account for him at B & M commencing in 1959 and that plaintiff had similarly handled two previous market accounts at other brokers commencing in 1956. Acciari further testified that he never gave any person specific instructions concerning transactions in his account with particular reference to Haywood and plaintiff. He stated that plaintiff was in full control of the account without specific instructions from him and that he had never met Baggot, Morrison or Haywood until 1960.

The Hirsch Soble Transaction

On October 19, 1959, plaintiff executed a trade on the exchange through B & M. This transaction purported to be made in the name of Hirsch Soble, an attorney. On October 20, 1959, Soble wrote to B & M. He stated that he had received a confirmation of this transaction regarding a short sale of November soybeans; he had not placed this order and would not be responsible. On October 22, 1959, Haywood responded to this letter with another letter in which he stated that the order had been placed by plaintiff for Soble's account with directions that any debit

should be entered against plaintiff but that any credit was to be applied to the Soble account. In the letter Haywood also stated that this transaction would be transferred to plaintiff's account and that Soble would be cleared of any possible liability. Plaintiff testified that apparently he did not execute the Soble trade because he was not at the market that day but that otherwise he would have executed it. The arbitrators found that Rosee was responsible for the Soble trade.

The James Near Transaction

In January 1958, plaintiff called defendant Baggot from Washington, D. C., and requested that B & M sell short 50,000 bushels of March wheat. He directed that this transaction was to be reflected in the account of "James Near." Prior to that date B & M had no such account. Baggot testified that plaintiff expressly guaranteed the account in this conversation and told Baggot that he would supply Near's address. The Near transaction turned out to be unprofitable. Baggot testified that plaintiff personally instructed him to put the transaction in plaintiff's own account. He stated that plaintiff told him that there was a relationship of some kind between James Near and a congressman.

Plaintiff denied this version of the transaction and denied the existence of any oral guarantee of the account by him. Plaintiff testified that he told Baggot to send a confirmation to James Near, in care of a cousin of Near's who was the son of the congressman. He testified that the account was for the congressman's son and Baggot was told of this fact. Plaintiff testified that he did not give Baggot Near's address but only the address of the congressman's son. Plaintiff testified that a confirmation of the transaction was sent to the congress-

man's son and that he saw such confirmation in the latter's office. These facts were expressly denied by Baggot.

At the arbitration, Baggot testified that the account remained short 50,000 bushels of March wheat until that quantity of wheat was purchased by Baggot on plaintiff's instruction. Since the price of this commodity had increased in the interim, the entire transaction ended in a loss of $4411.25. The evidence in behalf of defendants is that plaintiff was asked to pay the loss. Plaintiff testified that he was never asked to pay the loss. In handling this transaction, the records of B & M show that the loss in the Near account was debited against plaintiff's guarantor Shulman.

The firm sent a letter to Shulman on January 1, 1959, reflecting this loss. Shulman responded by letter dated January 6, 1959, in which he stated that he would not accept the loss. Thereafter defendant Haywood wrote to Shulman and conceded that Shulman's account should not have been debited. Instead, plaintiff's account with B & M (carried under account No. 11) was debited with the Near loss.

The trial court expressed the opinion that plaintiff had "welched" in this matter so that the loss was properly debited against plaintiff's account. However, in the calculation of damages in favor of plaintiff, the court allowed recovery of $4411.25 which had been debited against plaintiff because of this transaction. As we will later show, the Arbitration Committee concluded that B & M did not exercise due diligence in handling the account and the fact that the account remained on their books in Near's name for approximately 10 months indicated the opinion of defendants that the account was actually

that of James Near. The Committee accordingly gave plaintiff a credit in the total amount of the debit.

Plaintiff's Accounts No. 11 and No. 15

The ledger accounts of B & M commencing January 2, 1959, refer to plaintiff's account as No. 11. The latest entry on any of the ledger sheets for this account was November 17, 1959. This was the last transaction made by plaintiff in that account. The entry to the trading account shows a loss or debit on Nover[illegible] 17, 1959, of $4903.75. On that same date, plaintiff [illegible]ned a new trading account with B & M which was given No. 15. At that time plaintiff's previous account No. 11 was completely closed out. The new account No. 15 was opened by a deposit of $2000 by Fred Freigher, plaintiff's nephew. This guarantee was restricted in that it was to be applied only to any deficit that might occur in the new account.

As of the end of 1959, B & M records show that a profit of $6166 resulted in this new account from transactions carried out by plaintiff. However, a total of $2142.84 was debited against this net position leaving a credit in the amount of $4023.16. The debit reflected in part two separate checks drawn to Security Benefit Life Insurance Company. These checks and the transaction they represent will be the subject of later comment. On December 17, 1959, plaintiff signed a letter directed to B & M in which he agreed to the application of any existing credits from his special trading account, identified as No. 15, to guarantee any existing debits in his regular trading account No. 11 until these losses had been paid in full. Plaintiff testified that he had signed this letter but he did so only because B & M promised him they would give him records which he never received. Plaintiff referred to various trades which he contends

he had executed which did not appear in the records of B & M.

Plaintiff testified that his trading operations were profitable in 1959. His "close calculations" showed that he had an equity or credit of approximately $60,000 on September 17, 1959. This amount was in addition to credits due him by virtue of funds deposited by his guarantors. Plaintiff introduced no ledger sheet or other record of his own to substantiate this figure. In fact, he also testified concerning these calculations, "I did not keep any records." Plaintiff received a statement from B & M showing that he lost $46,778.74 from his 1959 trading. Plaintiff used this figure in the income tax return which he filed for 1959. He testified that he sent a letter to Internal Revenue Service with this return. He stated therein that he was not responsible for the figures in the return, and that "When I have my records I will correct this income tax." Plaintiff did not produce a copy of this letter.

Other Transactions

In this regard, plaintiff had reference to the period from August 13, 1959 through September 9, 1959. Plaintiff's testimony is that he made "big trades" on each of these dates but that he was never able to trace these transactions in the records of B & M. Plaintiff testified that he never attempted to examined P & S slips in this regard because of the trust he placed in defendants Baggot and Morrison. Plaintiff further testified that on August 12, 1959, he sold 180,000 bushels of November beans but that he was unable to find any record of this trade in his account. Plaintiff testified that he had copies of P & S slips which would prove that these transactions were credited to other accounts but such slips were never introduced.

Plaintiff further testified that the work sheet of B & M for August 12, 1959, only credits him with a sale of 60,000 bushels of November beans but that he actually sold 180,000 bushels of this commodity as reflected on four trading cards. These cards were all printed in plaintiff's name but three of them had plaintiff's name stricken and the initials W.O.C. were written in. Haywood testified that plaintiff brought the cards to him and told him that the transactions reflected thereon were for the account of William O'Connor and that he accordingly struck out plaintiff's name as printed on the card and inserted the initials W.O.C. These cards involved the sale of 120,000 bushels of the commodity. This quantity of beans, sold short on August 12, was bought in on August 13, 1959. The trading cards for this transaction were completely written by plaintiff and bore his name. Upon each card plaintiff's name was scratched out and plaintiff had written instead "Bill O'koner" (sic).

The Loan Made By Plaintiff

B & M maintained a customers' segregated fund account. As shown, this was for the purpose of making certain that in the event all customers of the firm wished to liquidate their accounts and withdraw all net credits, sufficient cash would be available for this purpose. The firm also maintained funds on deposit as required by the clearing corporation to secure margin requirements.

It is undisputed that three checks, to a total of $20,000, were drawn by B & M against the customers' segregated fund account. On August 7, 1959, the first check for $8000 was drawn from the drawing account payable to plaintiff. It was endorsed by plaintiff and then was deposited in the office account of B & M. The amount of the check was credited to the personal trading account of

defendant Baggot. The second check was drawn August 10, 1959, for $5000 payable to B & M. It bears the firm's endorsement and was deposited in the personal account of defendant Baggot. Plaintiff testified that at the time he had no knowledge of the issuance of this check. The third check dated September 17, 1959, was for $7000 payable to plaintiff. It was also endorsed by plaintiff and then deposited in the office account of B & M but credited to the personal account of defendant Baggot. The check stub bears a handwritten note showing $7000 as a credit to defendant Baggot from account No. 11 which was the number of plaintiff's drawing account.

Plaintiff testified that on November 5, 1959, defendant Morrison tendered a letter to him stating that the loan of $20,000 was a personal loan made to Baggot and did not affect B & M. This letter acknowledged the total of the three loans. It was written on plaintiff's stationery, some of which had been kept in the B & M office. Plaintiff testified that Morrison told him the letter was for the purpose of showing government agents to prevent disclosure of the existence of a loan to B & M from a customer. Plaintiff first refused to sign the letter but then agreed. Plaintiff also testified that he did not read the letter before signing it and that he had unlimited trust in Baggot. Defendant Baggot testified that he borrowed a total of $20,000 from plaintiff and repaid this amount and that this help was volunteered to him by plaintiff.

As will later be noted, the Arbitration Committee considered the circumstances of this loan. Baggot testified at the hearing that the loan was not to him individually but that it was repaid by the firm. Baggot testified at trial that he repaid the loan to plaintiff and that he borrowed money from his sister to do so. The record

shows that the money was actually repaid on November 16, 1959, by checks to a total of $20,000 issued by defendant Baggot personally and deposited in the B & M firm account. On that date, plaintiff's drawing account was credited with $20,000. On the next day the money was replaced in the firm's customers' segregated fund account by a check drawn upon the house account of the firm.

Ownership Of Account No. 35

Another complicated and disputed issue of fact arises in connection with a trading account on the books of B & M designated as account No. 35, opening during September of 1959. Haywood testified that the new account was requested by plaintiff in behalf of a friend of his and at that time plaintiff informed Haywood that he would furnish the name for the account at a later date. Haywood also testified that he suggested to plaintiff that the account be known as Rosee Account No. 2 but plaintiff refused. Haywood admitted that he was familiar with a provision of the Federal regulations governing commodity exchanges which provide that the name, address and occupation of every customer was to be recorded in permanent form. Haywood testified at trial that plaintiff identified his friend as being a person from Washington or Canada. At the arbitration hearing he testified that plaintiff "indicated" that the new account was for an official in Washington. Haywood also testified that trading cards with plaintiff's name were used in connection with the account on at least two occasions. In his testimony at trial, as well as at the arbitration, plaintiff denied knowledge of the account at any previous time.

Defendant Morrison testified that he made the initial trade in account No. 35 at the request of plaintiff. This

trade was evidenced upon a trading card with Morrison's name imprinted thereon and he delivered the card to plaintiff. Plaintiff testified to the contrary that he executed the trade on his own trading card at the request of defendant Morrison but that Morrison then destroyed the card and wrote the transaction on his own card.

On the B & M work sheet for September 14, 1959, a transaction appears for the short sale of 100,000 November beans for account No. 35. This transaction was reflected from the trading card with Morrison's name printed thereon. On September 15, 1959, Morrison was hospitalized as a result of an accident. He instructed Baggot to close out his position in November beans. At that time, Morrison had a short position of 150,000 bushels of beans. This order was followed but the existing short sale of 100,000 beans reflected on Morrison's trading card for account No. 35 was not terminated by a purchase at that time.

On September 21, 1959, 95,000 bushels of November beans were sold short according to a trading card with Baggot's name printed and account No. 35 written thereon. The transaction was noted in Baggot's handwriting. As regards account No. 35, Baggot testified that the figures were in plaintiff's handwriting. Plaintiff testified that these numbers were written by Baggot.

There is similar conflicting testimony regarding a number of other trades purportedly made in account No. 35. Plaintiff denied he executed any of these trades although a number of the trading cards bear his handwriting. Regarding these situations, plaintiff testified that he executed the trades and filled in the cards at the request of defendant Haywood but Haywood denied that he ever made such requests to plaintiff in connection with account No. 35.

Haywood testified that on September 30, 1959, he gave plaintiff monthly statements on accounts Nos. 11 and 35 and that he had no further conversations with plaintiff regarding these statements. At the time, the statements reflected a debit or deficit in the total amount of $54,486.76. Plaintiff denied that he received these statements until October of 1960 when he saw them for the first time at the arbitration. At trial, plaintiff testified that his trading position as reflected in account No. 11 was correct but that the amount of the deficit was fraudulent and untrue.

The work sheets made up by employees of B & M listed house accounts separately from customers' accounts in separate sections. Account No. 35 was always carried as an item in the customers' section. P & S slips were not issued for house accounts of B & M. Such slips were issued concerning all trades reflected in account No. 35.

In this connection, the Commodity Exchange Authority required written reports reflecting ownership or control in any single quantity in excess of 200,000 bushels. A market trader is required to file a report referred to as No. 201, whereas a commodity broker is required to file report No. 203 whenever he has a customer with an interest above the stated limit. On certain dates during the period that account No. 35 was active, the combined soybean holdings in Rosee's regular account No. 11 and account No. 35 were sufficient to invoke the requirement that B & M file a No. 203 report. The record shows that only one such report was filed and it was cancelled by B & M on the next day. During arbitration and at trial, defendants contended that reports on the total holdings in accounts Nos. 11 and 35 were not filed because Rosee had said that account No. 35 belonged to someone else.

Account No. 35 was closed out on November 10, 1959. At closing, the deficit or debit was $19,027.50. On November 17, 1959, plaintiff left the market so that he had no open position as regards account No. 11. At that time, calculation of the total debit or deficit pertaining to accounts Nos. 11 and 35, after making due allowance for all of the funds supplied by the guarantors for plaintiff, showed a net loss or deficit of $29,809.84.

At a point close to the termination of the arbitration hearings, on November 1, 1960, an attorney acting in plaintiff's behalf wrote to the Commodity Exchange Authority and made a detailed complaint against B & M. This letter includes a number of charges of a serious nature including manipulation of plaintiff's account, failure to supply proper memo cards, lack of monthly account statements and other allegations. However, no mention was made in this letter regarding the ownership of account No. 35 or of any alleged wrongful manipulations in this regard.

Insurance On Plaintiff's Life

It is agreed that plaintiff signed various applications for insurance upon his own life and that premiums paid on this insurance by B & M were debited against plaintiff's account. However, there is a complete conflict of testimony regarding the reason for the issuance of the policies. The first of these applications for insurance was signed by plaintiff on November 19, 1959. This date is nine days after the closing of account No. 35 and two days after the closing of account No. 11. Also, the face amount of the life insurance, $30,000, was arithmetically close to the total amount of the net deficit concerning both of these accounts.

The testimony of three insurance agents was brought out at trial. The first, Gregory L. Quinn, testified by evidence deposition that he came to a meeting at the B & M office with Baggot, Morrison and plaintiff at the request of Morrison. This was in late November of 1959. Quinn testified that Morrison stated the insurance was to be upon plaintiff's life for $30,000 because plaintiff was indebted to B & M in that amount. Plaintiff made no objection to this statement and requested that several different policies be issued so that he could transfer them back to himself as the indebtedness was lowered. Plaintiff agreed that he was present at such a meeting but denied that any indebtedness by him to B & M was ever mentioned. The policies were issued effective December 9, 1959. One was for $15,000 and three additional policies were each for $5000. The agent testified that after plaintiff's physical examination the policies were issued on an increased premium basis. He stated that plaintiff requested a reduction of these premiums but this was refused.

Plaintiff testified that Baggot and Morrison first approached him in August 1959 and agreed that they would pay the premiums on a policy. They said they wanted the insurance before he went to the hospital for some surgery and asked him if he had any objection. Plaintiff testified that he never agreed to pay the premiums. On the contrary, he testified that defendants Morrison and Baggot were gambling on his life for their own purposes and they told him that they would pay the premiums on the life insurance provided they were made beneficiaries. At the time the insurance applications were made, a check was drawn on the B & M office account for $250 which amount was debited to plaintiff's drawing account. This check was used for part payment of premiums. In December of 1959, B & M paid an additional

premium of $1292.84 by check which was drawn on the firm's customers' segregated fund account and also debited to plaintiff's special drawing account. Plaintiff testified at the arbitration that he saw this debit entry on the date it was made and after conversation with Morrison the total amount of both of the above checks was credited to plaintiff's special drawing account but was then debited to his regular account without his authorization. After payment of these premiums, which covered a period of six months, the policies were allowed to lapse.

Joseph K. Dennis, another insurance agent, testified that plaintiff contacted him by telephone during December of 1959 and requested information about some life insurance because he had an obligation with a firm at the Board of Trade and wanted to make them beneficiary. He testified that plaintiff then came over to his office and spoke about $30,000 of insurance but said that $20,000 might be enough as [w]e will probably be paying off a part of this * * *." He and plaintiff went down to the insurance company where plaintiff made an application for a $20,000 policy. The agent testified that the policy was not accepted by plaintiff and no premium was ever paid. In January of 1960, this agent wrote a letter to defendant Morrison in which he alluded to Morrison's interest in coverage on plaintiff's life and stated that he had secured $30,000 of insurance which plaintiff should be interested in continuing as he could change the beneficiary when the obligation to the firm had been paid.

The last agent, Walter R. Brailsford, testified by evidence deposition that he met with plaintiff, Baggot and Morrison in May of 1960. Morrison stated that plaintiff owed money to B & M and plaintiff agreed to apply

for the insurance. Plaintiff then made application for an ordinary life policy for $20,000 but the contract was refused by the company after his medical examination. The agent testified that shortly thereafter he talked to Morrison about a type of creditor-debtor policy which required no medical examination and then spoke to plaintiff on this subject on the floor of the exchange. Plaintiff then made a telephone call in his presence to some person he called "Don" to whom plaintiff repeated what Brailsford had said about the creditor-debtor policy. Plaintiff then signed an application for $20,000 of the so-called creditor-debtor insurance with B & M as beneficiary and plaintiff's own estate as contingent beneficiary. Therafter four policies of $5000 each were issued pursuant to the application. The agent testified that this type of insurance was limited to that amount as the maximum of any single policy.

Plaintiff pointed out that Joseph K. Dennis knew Baggot for some 20 years prior to January 1960. Dennis had handled group insurance programs for some members of the Board. Gregory L. Quinn had been a member of the Board since 1940. He referred to Baggot and Morrison as personal friends. He handled insurance for some five or six members of the Board including Baggot and Morrison. Walter R. Brailsford referred to Morrsion as a business and social friend for whom he had written insurance.

The Arbitration Committee considered the liability of plaintiff on account No. 35. The Committee noted in its written findings that the rate of commission charged on the account was that applicable to a member of the Board of Trade which is lower than commissions ordinarily charged. Also, plaintiff's handwriting appeared on certain of the trading cards, one of the P & S slips

in connection with the account was issued in plaintiff's name and the figures "35," in at least one case, were written by plaintiff. The Committee therefore determined that account No. 35 was in fact plaintiff's account. The Committee also concluded that there was a factual interrelation between ownership of account No. 35 by plaintiff and the fact that insurance policies for which plaintiff applied aggregated $30,000. The conclusions of the Arbitration Committee point out that without considering the debit resulting in account No. 35 the net debit of plaintiff after considering the funds of his guarantors "nowhere approached the $30,000 insurance figure***." The Committee concluded that plaintiff was liable for the total amount of premiums in connection with this insurance. The trial court concluded that plaintiff was not the owner of account No. 35 but that it was actually a house account of B & M.

Federal Investigation Of B & M

At all relevant times, the operations of the Board of Trade and of all member brokers thereof were subject to the Federal Commodity Exchange Authority (CEA). Various audits of the books and records of B & M were made by the CEA. As a result of these audits, the firm was suspended by order entered on May 26, 1960. Defendants Baggot and Morrison were charged by complaint with failing to treat customers' funds as belonging to them; failing properly to segregate these funds and use of funds of certain customers to margin and guarantee the trades of others. The suspension order found that the firm was undersegregated at various times from October 31, 1958 through February 29, 1960. This condition was almost continuous from October 27, 1959 through December 31, 1959, in amounts ranging from $291 to approximately $37,416.

Defendants Baggot and Morrison waived hearing of the charges made by CEA. They consented to an order suspending registration of B & M for three months and suspending their own trading privileges for 30 days. They then wound up and liquidated their partnership and retired from the business. At that time the ledger records of the firm showed a net deficit or debit due from plaintiff in the amount of $27,308.83. This was a net amount after application of all remaining funds of plaintiff's guarantors to reduce the debit.

The Arbitration Hearing

We will next consider the proceedings before the Arbitration Committee as this matter is, in our opinion, extremely important to decision of the case before us. After B & M had ceased its business activities, its records showed that plaintiff was indebted to the firm in the amount of $27,308.83. Morrison and Baggot were each half owners of the firm so that the share of each in this item of alleged indebtedness was $13,654.41. Baggot never took any action to collect his portion of this indebtedness. He testified that he felt he had a better chance of obtaining payment of the money if plaintiff continued with his trading activities.

At that time, the Board of Trade had a Committee of Arbitration for the purpose of hearing disputes between members. Morrison elected to press a claim for his share of the alleged indebtedness through the arbitration procedure of the Board. The rules of the Board provided that where a member has failed to perform a contract with another member, or has refused to pay obligations arising therefrom, he would be subject to suspension until the contract was performed or the debt satisfied. Where claims by one member against another

were admitted, or established by final arbitration award, the defaulting member would be suspended until he had satisifed and discharged all debts due to members of the Board arising from exchange contracts.

On June 8, 1960, plaintiff received notice from the Board that Morrison had elected to proceed with his claim. Plaintiff wrote to Warren W. Lebeck, one of the defendants, secretary of the Board of Trade, and requested that the matter be referred to the Arbitration Committee as there were "certain circumstances pertaining to this claim that should be arbitrated." Plaintiff and Morrison both signed a submission of the claim to arbitration and the proceedings commenced on July 26, 1960. The members of the Committee were the defendants Sidney C. Hamper, Martin H. Milek, Roy C. Loftus, Richard Rose, Raymond A. Comenzo and Thomas E. Herr. Sidney Hamper acted as chairman and Warren W. Lebeck, secretary of the Board, acted as secretary throughout the proceedings. A number of hearings were held before the Committee. The transcript of the proceedings, comprising 611 pages, has been received in evidence.

After completion of the proceedings, and on December 16, 1960, the Committee submitted a written award containing findings of fact, conclusions and an order. We have above stated the facts pertaining to a number of the items considered by the Committee. As shown, the Committee determined that account No. 35 was actually that of plaintiff. In this regard, the Committee commented upon the rate of commission charged, the writing upon certain trading cards and the procurement of insurance upon plaintiff's life. The Committee found and concluded that the James Near account had been opened by plaintiff but that B & M did not exercise due diligence in the matter because the firm permitted the account

to remain on its books in the name of James Near for approximately 10 months. The Committee concluded that the firm had treated the account as actually that of Near.

As regards the Hirsch Soble account, the Committee concluded that the matter was handled entirely by plaintiff. Since Soble immediately disclaimed responsibility, the Committee concluded that the transaction was rightfully charged against plaintiff. The Committee found that a check for $250 which had been debited to plaintiff's account did not bear his endorsement so that plaintiff's denial of this portion of the debt was well taken. A check for $5000 which constituted part of the $20,000 loan from plaintiff, above referred to, was also not endorsed. However, the Committee found that the total amount of $20,000 was debited and then credited so that the issue did not constitute "a controversial matter."

Regarding the insurance premiums, the Committee noted that plaintiff did sign insurance applications and did submit to a physical examination. It found that the premiums were paid by B & M check and debited to plaintiff's account. The Committee concluded that plaintiff should be held liable for the total insurance premiums. We will later consider additional conclusions stated by the Committee.

Acting upon the findings and concusions above set forth, the Committee gave plaintiff credit for the James Near loss of $4411.25 and for the $250 check which was unendorsed. Nhis was a total credit of $4661.25 on the full indebtedness, leaving a net balance of $22,647.57 which represented the total net amount that would have been due from plaintiff to B & M. The Committee accordingly ordered plaintiff to pay Morrison one half of

this amount, or $11,323.78. The Committee also assessed the arbitration fee of $50 against plaintiff.

Acting under the rules of the Board of Trade, plaintiff appealed the award to the Committee of Appeals maintained by the Board. The Committee consisted of a chairman and six members of the Board, none of whom had participated in the original arbitration proceedings. On February 16, 1961, the Committee of Appeals entered a written award. It concluded unanimously that the appeal filed by plaintiff added no actual evidence to that contained in the record of the Committee of Arbitration. After due consideration of all of the evidence presented before the Committee of Arbitration, the Committee of Appeals voted unanimously to sustain the award in favor of Morrison. The Committee taxed an appeal fee of $50 against plaintiff.

On March 1, 1961, plaintiff was suspended from membership in the Board of Trade in default of payment of the award. The award remained unpaid and during July of 1963 plaintiff's membership in the Board was sold for $8800. The within proceedings were originally filed in the circuit court on July 12, 1963.

Defendants Baggot and Morrison in their respective briefs (adopted by defendant Haywood pursuant to permission from this court) claim that the arbitration award was final and binding, in the absence of fraud, and that the judgment appealed from should accordingly be reversed. Plaintiff does not attack the theory of this substantive point regarding the binding qualities of arbitration awards in general but advances the contention that the arbitration proceedings here were conducted in violation of the Board charter and numerous Board rules and were a mere sham so that plaintiff was, in effect, denied due process of law. Plaintiff further asserts that

the alleged defects in the arbitration proceedings were themselves evidence of the arbitrators' collective intent to further the purposes of the alleged conspiracy.

Plaintiff first urges that Rule 130 of the Board, which provides for suspension of a member in event of default, and entitles an alleged defaulter to obtain arbitration of the claim, actually establishes compulsory arbitration. Plaintiff urges that this is contrary to law because the original legislative act for incorporation of the Board of Trade empowers the corporation to appoint committees of arbitration and of appeal for the settlement of disputes voluntarily submitted. Plaintiff cites *Ryan* v. *Cudahy* (1895), 157 Ill. 108, 119, 41 N.E. 760, as authority for the proposition that the Committee of Arbitration is obliged to conduct its investigations in accordance with the charter of the Board under which the Committee was appointed. The legal efficacy of this point need not be considered because in the situation before us plaintiff was free to seek redress through the usual legal procedures prior to the arbitration. Rule 130 does not preclude judicial remedies and therefore does not prescribe arbitration as the sole alternative to suspension of membership privileges. Instead, plaintiff voluntarily elected not to proceed at law but to proceed by arbitration before the Committee.

Plaintiff's letter of June 10, 1960, constituted a voluntary request by him for submission of the claim to arbitration under the rules of the Board of Trade. Plaintiff and Morrison also executed an agreement for submission of the claim to arbitration. Plaintiff further sought himself to invoke the jurisdiction of the Committee of Arbitration by his counterclaim against Morrison which he later withdrew.

Having thus voluntarily sought arbitration, and after full and lengthy participation in the proceedings before the Committee, plaintiff attempted to reverse the award by following the procedure before the Committee of Appeals. Only after both of these tribunals had rejected plaintiff's contentions did he attempt recourse to the courts. Approval of this type of tactics would virtually eliminate arbitration as a useful tool for settlement of disputes. We conclude that Rule 130 on its face and as applied in the instant case does not impose a system of compulsory arbitration and does not violate the charter of the Board in this regard.

Plaintiff next urges that his decision to arbitrate was fraudulently induced by a letter, dated July 13, 1960, from the secretary of the Board. In this letter the secretary stated that the Board had informed Morrison of plaintiff's request for arbitration under Rule 130 of the Board. The secretary stated that he would prepare the necessary forms for signature by plaintiff and Morrison. The letter also contained the statement that the Board had asked the secretary to inform plaintiff that the information which he requested regarding his account with B & M "will necessarily be a part of the evidence submitted to the Arbitration Committee." Plaintiff contends that this letter should be construed to refer to all B & M records without exception so that production of these records was an implied condition to his agreement to arbitrate. Therefore, plaintiff concludes, since all such documents were not produced at arbitration, the letter evidenced "the fraudulent intent of the Board" and is grounds for vacation of the award for failure of condition.

The difficulty with this argument is that the letter from the Board is dated July 13, 1960, but the letter from plaintiff requesting arbitration was signed by him

on June 10, 1960. It requires no additional demonstration to convince us that plaintiff placed no reliance upon the subsequent letter which was not in existence at the time that plaintiff executed his original and voluntary request for arbitration. In addition, as pointed out by counsel for the Committee, quite aside from the time element, it would indeed be difficult to construe the letter from the secretary as a promise that any and all records of every kind demanded by plaintiff would necessarily be produced before the Committee. Further, as will be shown below, the Committee assisted plaintiff in obtaining the specific B & M records which he requested. We find no evidence of fraudulent intent in this letter or in the subsequent conduct of the arbitration in relation to the production of records.

Plaintiff next contends that the Committee did not compel production of original records but instead relied on secondary evidence in violation of Board Rules 185, 186 and 187. Rule 185 provides in part that the arbitrators shall be sworn to determine all disputes according to principles of equity and justice. In pertinent part, Rule 186 permits any defense to be made at arbitration which would be available in a court of law or equity. Rule 187 requires, *inter alia*, that an arbitration award be entered according to the laws of the land.

At the very commencement of the arbitration, the Committee directed that all records pertaining to plaintiff's account from the inception thereof were to be made available for plaintiff's examination for one week. The hearing was then adjourned for a week. There was additional comment regarding the records at the next session of the Committee. Plaintiff there stated that Morrison had produced ledger sheets and canceled checks but had not made all records available. Morrison took the posi-

tion that plaintiff should be obliged to make demands for inspection of specific records but the Committee directed that all records be made available. From time to time thereafter there was considerable discussion before the Committee regarding production of each and all of the records such as all trading cards of every kind. Both plaintiff and defendant James J. Coughlin, a member of the Board of Trade, and an attorney who acted in Morrison's behalf throughout the proceedings, had furnished letters to the Committee stating in detail their respective claims regarding production of the records. The Committee referred the problem to counsel for the Board of Trade.

While awaiting advice of counsel, the Committee directed production of the specific records pertaining to the account carried in the name of James Near. These records were in fact produced at the next hearing of the Committee. Counsel for the Committee answered the request by a letter dated September 23, 1960. The letter reviewed the contentions of the parties regarding production of records and pointed out that the various trading cards were really sources of original entry but that ledger accounts made in the usual course of business, fairly contemporaneously with the items entered and constituting the first permanent record of the transactions recorded, were proper evidence with trading cards to constitute a source of verification for ledger entries. The letter stated counsel was informed that plaintiff did not question the accuracy of any ledger entry. Counsel therefore advised the Committee that production of all of the trading cards would serve no purpose. Counsel also pointed out that the Committee had no authority to comply with plaintiff's repeated demands for a general audit of his dealings with the firm.

The Committee accordingly suggested that plaintiff be specific in his demands concerning which of the trading cards he would need in addition to the ledgers. The Committee requested that plaintiff specify which entries he had found to be false in the trading ledgers, but, plaintiff repeated only that he had found that "many entries were false and untruthful." In fact, the records were produced in all instances where plaintiff specified a violation of his rights or raised a definite claim regarding his dealings.

At a later time plaintiff requested the trading cards and P & S slips pertaining to account No. 35. In due course these trading cards and P & S slips were produced. In its final award the Committee stated that plaintiff had insisted that he have access to all of his trading cards and all of B & M's records covering his accounts. The Committee pointed out that defendant Morrison had produced all trading cards and other material as regards specific items challenged by plaintiff. The Committee also stated, "Mr. Rosee did receive the usual and customary information such as P & S's and position cards in the ordinary course of business." The Committee pointed out that plaintiff is an experienced trader, "and it is quite inconceivable to the Committee that he would not know where he stood in the market and money-wise with a house." The Committee also referred to the tax statement given to plaintiff in January of 1960 which reflected total losses by him of some $46,000 for that year. The Committee commented on the fact that elimination of account No. 35 would have made this figure in error by well over $20,000. Upon consideration of this matter, we have concluded that plaintiff was fairly treated by the Committee of Arbitration as regards Board rules and principles of due process and fundamental fairness. Plain-

tiff was not prejudiced by failure of the Committee to require mass production of all books, papers and records of every kind.

Plaintiff's next contention is denial of due process and violation of Board rules by the Committee because Morrison was represented at the arbitration by James J. Coughlin, a member of the Board of Trade and also an attorney, while plaintiff appeared without counsel. Plaintiff correctly points out that under Board of Trade rules controversies are to be determined "according to the principles of equity and justice''; awards shall be granted in accordance with "the laws of the land'' and no member has the right to be represented by "professional counsel" in Board of Trade Committee proceedings. Coughlin, also a defendant in these proceedings, appeared on behalf of Morrison commencing with the first hearing before the Committee. Plaintiff appeared pro se at all hearings.

At the fourth session of the arbitration hearings, plaintiff objected to the presence of Coughlin. The Committee questioned Coughlin and determined that his status was not that of "professional counsel.'' The regulations of the Board of Trade provide that members who persistently solicit the right to appear as counsel in any hearing before the Board or its committees or any licensed attorney who acquires membership for the purpose of representing a member in such proceeding shall be regarded as professional counsel. The Committee then informed plaintiff that he had and could exercise the right to be represented before the Committee by any member of the Board of Trade. Plaintiff replied that he wished to have "professional counsel'' to represent him. This interchange was repeated at a later session of the Committee.

of the Board of Trade gained from long experience.

Plaintiff again requested that he be represented by an attorney who was not a member of the Board of Trade. The Committee again denied this request and pointed out once more that plaintiff had the privilege of being represented by any member of the Board. Plaintiff then stated that at least 20 members had refused to act in this capacity. In the remaining sessions of the Committee, the point was not raised again and plaintiff continued to appear pro se.

It appears from plaintiff's statements to the Committee on at least one occasion that plaintiff was receiving advice from an attorney. We will add that this record demonstrates that plaintiff is a person of a high degree of intelligence with an excellent knowledge of the operation of the Board of Trade gained from long experience. He withdrew his counterclaim from consideration by the Committee after obtaining legal advice and he has not hesitated to act pro se in various phases of the lengthy litigation here involved.

We therefore conclude that plaintiff was not deprived of due process of law or of any right established by the rules of the Committee or the Board concerning assistance of counsel. We are also of the opinion that the Committee was not required to adhere strictly to judicial standards of due process as required from a duly constituted court of law. Even as regards disciplinary proceedings before voluntary associations, the legal requirement is simply that they be carried out fairly and impartially and without denial of essential rights. (*Van Daele* v. *Vinci* (1972), 51 Ill. 2d 389, 394, 395, 282 N.E. 2d 728, *cert. denied*, 409 U.S. 1007.) We conclude that the proceedings of the Committee complied fully with the legal requirements thus established.

Plaintiff contends that the Committee denied him the right to subpoena witnesses in violation of Board Rule 186 permitting any defense to be presented at arbitration that would be available in a court of law or equity. He urges that this denial was in contravention of the Board charter which provides *inter alia* that an arbitration committee chairman may issue subpoenas compelling the attendance of witnesses. The record of the arbitration proceedings does not support this contention. On one occasion plaintiff requested that the chairman call a specified witness. The chairman replied that counsel had advised the Committee that it had no right to call witnesses for plaintiff but that plaintiff could call any witness that he desired. During the remainder of the proceedings, plaintiff made no showing that the testimony of this witness was necessary to his case and the witness was never called. On these facts we conclude that plaintiff's rights were not impaired and we hold that the Committee of Arbitration did not abuse its discretionary power to issue subpoenas.

Plaintiff's next contention that the Committee refused to permit him to file a setoff is rebutted by the fact that plaintiff sought to assert a claim against Morrison for $44,537.75. This was done when the chairman read into the record a lengthy letter from plaintiff in which he itemized an alleged indebtedness due to him from defendant Morrison as a result of plaintiff's trading on the exchange. The chairman advised plaintiff that this claim could become a subject of arbitration only by mutual consent of both parties in accordance with the applicable rules. In our opinion this statement by the chairman was correct. However, to the extent that plaintiff's cliam constituted a setoff or defense in reduction of Morrison's claim, it was not only germane but his position was in fact the subject of a full hearing by the

Committee without the need of interposition of a counterclaim. In any event, on November 15, 1960, plaintiff wrote a letter to the Board of Trade in which he withdrew his counterclaim on the advice of his lawyer.

Plaintiff also complains that the Committee awarded payment to Morrison of insurance premiums advanced by B & M on the policies covering plaintiff's life. In this court, as well as at arbitration, plaintiff's theory has been that by charging plaintiff for these premiums, the Committee of Arbitration violated Board Rule 130 which provides for suspension of a member for refusal to pay obligations "arising out of" exchange contracts. But by awarding the premiums to Morrison, the arbitrators, by implication, construed Rule 130 to include this type of debt. We concur in this construction of the rule. These insurance premiums were paid to secure plaintiff's obligation to B & M which arose directly from his trading losses as reflected by the B & M ledgers.

In addition, under Illinois law, the scope of the arbitrators' power is defined and determined by the arbitration agreement. (*Flood* v. *Country Mut. Ins. Co.* (1968), 41 Ill. 2d 91, 93, 242 N.E. 2d 149; *Safeway Ins. Co.* v. *Parker* (1969), 105 Ill. App. 2d 208, 210, 245 N.E. 2d 75.) Plaintiff here agreed to submit Morrison's claim, which included insurance premiums advanced, to binding arbitration. Furthermore, if the award were erroneous in this respect the situation could not be classified as a wilful violation of plaintiff's rights or as a denial to plaintiff of due process or fair procedure under "the laws of the land."

The final contention by plaintiff is that his membership was improperly sold by the Board since the rules of the Board provide only for suspension of the defaulting member until the debt in question has been paid. The facts are that the suspension of plaintiff from his membership was made effective on March 1, 1961. The debt found by the Committee to exist was not paid by plaintiff. On July 2, 1963, the Board proceeded to sale of plaintiff's membership. Board Rule 123 provides that, if a suspended member does not settle the indebtedness and apply for reinstatement within one year from the date of suspension, his membership may be disposed of by the Board.

Predicated upon the above analysis, we hold that plaintiff was not deprived of due process in any respect at the arbitration hearings but, on the contrary, the hearings were conducted by the Committee with fairness and impartiality. In this regard, plaintiff alleged in Count II of his complaint that some or all of the arbitrators were grossly prejudiced against plaintiff; two of them informed plaintiff before all the evidence had been presented that they would decide against him; some or all of the arbitrators knew that Morrison's claim was false and fraudulent; the arbitrators heard testimony which they knew was perjured; the Committee received evidence out of the presence of plaintiff and plaintiff was suspended as a result of an award that the directors of the Board of Trade knew was false and fraudulent. Plaintiff also alleged that the officers and directors of the Board of Trade, who are parties defendant to these proceedings, conspired and agreed with other persons unknown to plaintiff by causing frequent and repeated charges to be filed against plaintiff; by causing plaintiff's suspension from membership; and, by this conspiracy with defendants Baggot, Morrison, Haywood and others, succeeded in destroying plaintiff's business and occupation.

At the close of plaintiff's case, the defendants Board of Trade, the individuals who were its officers and all of the members of the Arbitration Committee joined in a motion for judgment in their favor. Defendant James J. Coughlin also made a motion to dismiss. The trial court entered orders granting these motion and dismissing each and all of these defendants. The court stated that plaintiff had failed to establish a prima facie case against the Board of Trade or the individual defendants. Plaintiff has appealed from this judgment order.

Although phrased as a motion for a directed verdict, this motion was necessarily based upon the Civil Practice Act provision for such motion in all cases tried without a jury. The statute directs that "In ruling on the motion the court shall weigh the evidence." (Ill. Rev. Stat. 1971, ch. 110, par. 64(5), *as amended*, Ill. Rev. Stat. 1975, ch. 110, par. 64(3).) It has been frequently held that in this type of proceeding the trial court should not consider the evidence in the light most favorable to plaintiff; but it is obliged to weigh the evidence, to draw reasonable inferences therefrom, to determine the credibility of the witnesses and then to make a final judgment and enter judgment for defendant if the plaintiff has not proved his case by a preponderance of the evidence. In these cases, the ruling by the trial court will not be reversed on appeal unless it was contrary to the manifest weight of the evidence. *City of Evanston* v. *Ridgeview House, Inc.* (1976), 64 Ill. 2d 40, 57-58, 349 N.E. 2d 399; *Hawthorn Mellody Farms Dairy, Inc.* v. *Rosenberg* (1973), 11 Ill. App. 3d 739, 743, 744, 297 N.E. 2d 649. See also *Jackson* v. *Spivey* (1975), 26 Ill. App. 3d 670, 674, 325 N.E. 2d 323; *Rey* v. *Rey* (1974), 23 Ill. App. 3d 274, 276, 277, 319 N.E. 2d 105; *In re Estate of Pomeroy* (1974), 21 Ill. App. 3d 648, 316 N.E. 2d 231.

There is one further guidleine which requires consideration in determining the legal propriety of this ruling by the trial court. The gravamen of plaintiff's complaint as regards the Board defendants was that they, including the members of the Committee of Arbitration, conspired with the remaining defendants to destroy plaintiff. The essential element of these allegations is the existence of a conspiracy between all of these defendants. Since conspiracies are generally evolved under the cloak of secrecy, the courts have traditionally permitted proof of a conspiracy by indirect or circumstantial evidence, but, have applied a cautionary corollary to this rule by holding that, "such evidence must be clear and convincing, and if the facts and circumstances relied upon are as consistent with innocence as with guilt it is the duty of the court to find that the conspiracy has not been proved • • •." *Tribune Co.* v. *Thompson* (1930), 342 Ill. 503, 529, 174 N.E. 561 and cases there cited. See also *Sears* v. *Weissman* (1972), 6 Ill. App. 3d 827, 834, 286 N.E. 2d 777; *Bimba Mfg. Co.* v. *Starz Cylinder Co.* (1969), 119 Ill. App. 2d 251, 267, 256 N.E. 2d 357, *Leave to appeal denied*, 44 Ill. 2d 583.

Application of these principles to the case before us requires approval of the ruling of the trial court dismissing all of the Board defendants at the close of plaintiff's case. The proof before us falls far short of meeting this prescribed standard as to all of these defendants and as to defendant Coughlin. On the contrary, there is no evidence of such conspiracy. None of the allegations of plaintiff's complaint, above summarized, are supported by the evidence before us.

We are, therefore, in complete accord with the order of the trial court dismissing the case as to these defendants. In our opinion, plaintiff has not met the required

burden of proof against any of these defendants and, in addition, has failed even to make a prima facie case against them. The ruling appealed from is not contrary to the manifest weight of the evidence.

As to defendants Baggot, Morrison and Haywood, we must now consider the legal consequences which flow from the judgment entered in favor of the Board defendants and Coughlin and approved by this court. The courts of Illinois have consistently held that where parties by mutual agreement submit a dispute to arbitration, the award by the arbitrators is final and binding, "having all the force of an adjudication and effectually concluding the parties from again litigating the same subject." (*White Eagle Laundry Co.* v. *Slawek* (1921), 296 Ill. 240, 244, 129 N.E. 753.) In *White Star Mining Co.* v. *Hultberg* (1906), 220 Ill. 578, 601, 77 N.E. 327, the court held, "The rule is, that if an award is in conformity with the general submission and no fraud or mistake appears upon the face of the award, it will not be interfered with or set aside by the court for errors, either of law or fact, committed by the arbitrators." Other authorities enunciating the same general principle are *Erbach & Haunroth Realtors* v. *Burnett* (1975), 31 Ill. App. 3d 236, 239, 333 N.E. 2d 592 and *Cohen* v. *Meyers* (1969), 115 Ill. App. 2d 286, 294, 253 N.E. 2d 144.

The litigation before the trial court was concerned with the identical factual situations which were considered and decided by the arbitration award such as account No. 35, the James Near account, the Hirsch Soble account, the loan of $20,000, the debiting of insurance premiums against plaintiff's account and the losses in accounts Nos. 11 and 15. The basic factual issues in both proceedings centered on B & M's alleged fraudulent manipulations of plaintiff's accounts and records so as to

create a fabricated and false indebtedness from plaintiff to B & M. Reasoning from the premise that the members of the Arbitration Committee and the officials of the Board of Trade were not guilty of any conspiracy, partiality or other misconduct, it follows necessarily that the award should have all the force of any other legal adjudication so as to preclude the parties thereto from further litigation upon the same matters.

But, there is a potent exception to the universal application of this principle. The exception is established in Illinois common law and codified in the statutes. In *White Star Mining Co.* v. *Hultberg* (1906), 220 Ill. 578, 602, 77 N.E. 327, the court stated that arbitrators "become judges, by the choice of the parties, both of the law and the facts, and there is no appeal or review from or of any decision made by them within the scope of their powers, except for fraud, partiality or misconduct." (See also *Podolsky* v. *Raskin* (1920), 294 Ill. 443, 450, 128 N.E. 534; *Ramonas* v. *Kerelis* (1968), 102 Ill. App. 2d 262, 274, 243 N.E. 2d 711.) At the time of the arbitration proceedings here involved, the statute then in effect provided, "[I]f it shall appear * * * that said award was obtained by fraud, corruption or other undue means, or that such arbitrators misbehaved, said court may set aside such award." (Ill. Rev. Stat. 1959, ch. 10, par. 11.) Since we have concluded that the arbitrators themselves did not engage in any fraudulent conspiracy, the issue of fraud revolves about whether defendants Baggot, Morrison and Haywood obtained the award by fraudulent means.

The solution of the problem lies in an examination of the record before us to determine if books and accounting records were deliberately destroyed or withheld from plaintiff by B & M during the course of the litigation

and whether any of the documents presented to the trial court or to the arbitrators were fraudulent.

Throughout plaintiff's lengthy brief, statements are repeatedly made that the three remaining defendants in the case were guilty of deliberate fraud in that certain records which were crucial to the proof of plaintiff's case were withheld by the firm of B & M and not produced, and that certain of the documents presented to the trial court and to the Committee of Arbitration were entirely spurious and false and had been specifically manufactured for the purpose of thwarting plaintiff's legitimate claims. These are the questions which must be examined now.

This investigation must be conducted in the light of two important legal principles. First, we are keenly aware that the result reached by the trial court here may not be disturbed unless the holding of the court is against the manifest weight of the evidence. We cannot forget that the trial judge had a superior opportunity "to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof." *Reese* v. *Melahn* (1973), 53 Ill. 2d 508, 513, 292 N.E. 2d 375, quoting from *Schulenburg* v. *Signatrol, Inc.* (1967), 37 Ill. 2d 352 356, 226 N.E. 2d 624.

Second, we need hardly cite cases in support of the presumption that all men are honest; fraud cannot be presumed or established upon mere suspicion but must be the subject of affirmative proof by clear and convincing evidence which will satisfy the mind of the trier of fact that the charge is true. *Bundesen* v. *Lewis* (1938), 368 Ill. 623, 632, 15 N.E. 2d 520.

In considering the strong statements of plaintiff's able advocate regarding commission of culpable, fraudulent

acts by the defendants, we must carefully and impartially examine the record with due regard to these applicable legal theories. This necessitates a careful check and examination of many of the accounting documents received in evidence at trial. Our efforts in this regard convince us that plaintiff's brief opens this portion of the argument with an erroneous factual assumption which demands clarification.

Plaintiff states that the work sheets kept by B & M reflected the opening position for the day for each trading account at the top and the subsequent closing position for the day at the bottom. The contrary statement is correct. Examination of work sheets received in evidence discloses that at the bottom each shows the opening position of each active trader for the date in question while the trades for that particular day are reflected at the top. This seemingly unimportant detail is of great significance. An attempt to analyze the work sheets and reconcile them with other records of B & M, if commenced from the erroneous premise that the closing position of each account for the day appears in the lower portion of the work sheet, leads into a cul-de-sac with the inevitable result that reconciliation of the records is impossible.

Proceeding in this erroneous manner, the work sheets have no continuity or relationship with each other and any attempt at verification of the true status of plaintiff's account is utterly impossible. However, when these work sheets are analyzed with other records of the firm commencing with proper information and from the correct premise that the opening position of the trader is at the bottom of the sheet, these sheets are coherent from an accounting point of view and have a proper and logical continuity and relationship each with the other. Start-

ing from this premise, the work sheets for consecutive trading days are logically interconnected and show the course and effect of the trading activities of each day.

Plaintiff contends that all of the work sheets supplied by defendants were prepared a few days prior to one of the hearings before the Arbitration Committee held October 12, 1960. This contention is contrary to the record. Examination of the transcript of the arbitration hearings shows that Haywood testified there that a compilation which he personally prepared from the records of B & M was made up a few days before the October 12 hearing. This compilation was introduced at trial and was received in evidence for what it truly was. It had no connection with or relation to any of the work sheets. There is no evidence of fraudulent preparation as to any of the actual work sheets.

Plaintiff contends that the work sheets are patently fraudulent because B & M had 140 accounts on their books but the work sheets showed only from 60 to 65 customers. Plaintiff therefore reasons that the work sheets were fraudulently made up and that the records of some 75 to 80 customers of the firm are missing. The figure of 140 accounts is not accurate. This number was drawn from a Commodity Exchange Authority report which plaintiff's attorney attempted to use at trial to refresh Morrison's recollection as to the number of open accounts carried by B & M on the date of the report. In response, Morrison did not verify this number of accounts but actually testified that he did not think the firm had that many. The government report pertained to April 30, 1959, while the work sheets before the trial court here covered the period from August 1959 through November 1959 and there is evidence in the record that the work sheets showed only the names of active accounts. Thus, even if the discrepancies were actual this would not under any circumstances constitute direct or indirect evidence of fraud and certainly not evidence of manufacture of the work sheets from whole cloth.

Plaintiff urges that the work sheets in evidence were false because, contrary to usual B & M practice, they did not indicate prices. However, plaintiff's claim that there was testimony by a witness that the work sheets did normally show prices is incorrect. Close reading shows that this witness had no reference ot the type of work sheets here involved and introduced in evidence but was speaking of a type of work sheet which did not reflect closing or overnight positions but merely reflected daily trades. The record further shows that the type of work sheet in evidence in this case and above referred to did not carry prices for individual trades but only listed money totals in lump sums for house and customer trades.

Plaintiff continues the analysis of the work sheets by referring to position cards. As we have shown above, each floor trader was given a position card each morning. This reflected his position in the market as to whether he was long or short and to what extent. These position cards had dates stamped thereon and reflected the trader's closing position for the stamped date. Thus, when, on the morning of August 13, 1959, a trader received his position card it would be stamped August 12, 1959, and would show his position at the opening of August 13, 1959. On both direct and cross-examination plaintiff testified in effect that this was the correct description of the position cards. But plaintiff's brief, in attempting analysis of this situation, erroneously treats these position cards as indicating the closing position of the trader for the day prior to the date stamped on the card.

Attempted analysis of the work sheets in conjunction with the position cards, according to the theory of plaintiff and his counsel, makes any type of verification impossible. Examined in this manner, no position card will ever match the closing positions of the trader as computed from the work sheet for the prior day. However, when the position cards are properly used, the positions there shown as of the date of the cards dovetail wtih the closing positions as calculated from the work sheets for that same date. Proper analysis convinces us that the work sheets produced by defendants were in good order and reflected correct statements of the status of plaintiff's account upon the designated dates.

In certain instances, the confusion above pointed out results from the testimony of Haywood. Undoubtedly Haywood was a confused witness. The trial judge used the word "amoral" in describing Haywood. We cannot agree with this descriptive word. On the contrary, we gather from reading the record that Haywood was an unsatisfactory witness not from malicious motives or with fraudulent intention but simply because of his own mental weakness, probably associated with alcoholism. He was subjected to sharp and lengthy cross-examination by able counsel as well as most searching examination by the trial court. Under this type of stress and strain his mentality clearly weakened and manifested its lack of strength in the fact that he was easily led from one position to another and sometimes his testimony displayed uncertainty and even inconsistency. However, under no circumstances can we equate this condition with proof of fraud. In these cases of inconsistency, the correct version stated by Haywood will appear with clarity from close examination of the documents in evidence, precisely as the proper relationship between work sheets and position cards and the use of the work sheets themselves

appears above. Instead of proof of fraud, in our opinion, the records before us serve to support and justify the result reached in the arbitration award.

Plaintiff's brief contains a computation, allegedly using B & M records, to prove that on November 17, 1959, plaintiff's account contained a debit of $779.26 whereas other B & M records indicate that plaintiff's debit on that date was $29,809.84. Plaintiff asserts that his figures prove the falsity of defendant Morrison's claim before the arbitrators and evidence "the plot to tap plaintiff as a source of revenue for B & M."

In developing his computation, plaintiff initially assumes that his open commodity position at the start of trading on November 17, 1959, was the same as that shown on the B & M work sheet for November 9, 1959. The actual computation then begins with $1079.26, an amount which is asserted to be plaintiff's total ledger debit with B & M on November 9. To this figure are added three sums representing plaintiff's asserted gains and losses from liquidation of his open position in November, May and July beans on November 17, 1959. The result is a net loss of $779.26 which plaintiff contends is an accurate reflection of his position on that date. We do not find plaintiff's computation to be correct.

Plaintiff commences with a statement ascribed to the chairman of the Committee of Arbitration made during those hearings that at the close of business on November 9, plaintiff's deficit was $1079.26. This assumption is invalid. The chairman actually used these figures but close reading of his entire statement shows that he did not include account No. 35 therein. This would greatly have increased the deficit. Also, the chairman noted that on November 9, 1959, plaintiff's deficit was $1079.26 after

"giving Mr. Rosee a credit for $20,000. which had been paid to Mr. Baggot***." This is the $20,000 item which the record shows to have been repaid in full and duly credited to plaintiff's account on November 16, 1959.

The second error in plaintiff's computations is based on a net loss figure of $779.26 on November 17, 1959. This results from the assumption that plaintiff's position was entirely closed out on that day according to prices at the close of the market. Examination of the pink copy of the purchase and sales slip for November 17, 1959, produced by defendants, shows that plaintiff's holdings were not liquidated at the closing prices on that date but at prices less advantageous to plaintiff. According to the figures on this purchase and sales slip, plaintiff's total loss, after closing of the market on November 17, 1959, on the three items which constituted his position at the close of November 9, 1959 (November, May and July beans), was actually $4868.74 and not the $300 profit claimed by plaintiff. We are therefore obliged to reject the type of computation advanced by plaintiff.

Two additional claims of fraud require consideration. Plaintiff contends that an entire ledger sheet maintained by B & M for plaintiff's account No. 11 was fraudulently recopied. This claim is completely refuted by the record which shows that the firm actually operated with duplicate ledger sheets. One of these sheets was used by Haywood in connection with preparation of position cards. The other was used by the bookkeepers in the office for the day-by-day entry of various transactions. These sheets were in all respects identical and were maintained for purposes of office economy. On one occasion, omission of one entry was pointed out to Haywood. He accordingly recopied the particular ledger sheet on which he inserted the erroneously omitted transaction. This entry

was dated January 6, 1959, was in the sum of $4411.25 and represented the loss from the James Near transaction above explained. This appears clearly from the fact that Haywood retained the original sheet without this entry and the recopied sheet which included it. It seems to us that the facts of life and human nature generally do not permit a person who perpetrates a grievous fraud carefully to preserve for posterity a precise record of his own transgressions. We conclude that use of the duplicate ledger sheets was entirely innocent in purpose and result.

Plaintiff also contends that the daily segregation statements maintained by B & M were fraudulently withheld from evidence and were never produced. It is correct that these statements were not produced and were not received in evidence. As above pointed out, these records were kept for the purpose of providing information as to the net amount of funds that B & M would owe all of its customers if all were simultaneously to liquidate their positions and demand their net credits. These statements would only show the identity of each customer's account which had a net debit at the end of the trading day. Thus, if these records had been available, they would not show plaintiff's net position upon any particular day; assuming plaintiff's basic theory is correct and there were large credits to his account. The production of these sheets would have served only to verify and support defendants' theory that plaintiff's account generally reflected a deficit.

In any event, such speculation is useless as the sheets in question were not produced. These sheets were in existence at the time of the government investigation of B & M. The government records were turned over to the United States District Court at the time of pro-

ceedings there as above shown. However, whether they were introduced in evidence at the long hearings before the district court is not clear. There is evidence that at one time some B & M records were moved to the office of the attorneys for the Board of Trade where they were apparently kept for several years. Certain of these records remained in storage at the Board of Trade building. However, as regards the absence of the daily segregation records at the present time, the record is entirely devoid of reason or explanation. In our opinion, a trier of fact may not reason from this single circumstance that the inability of defendants to produce these particular records resulted from their own fraud or from deliberate concealment. A person who wished to conceal records would hardly have chosen these largely immaterial matters as a proper or profitable instrument of fraud.

Plaintiff also contends that the record shows deliberate destruction of P & S slips by Haywood and that this is clear and convincing evidence of defendants' fraud.

An attorney who had represented plaintiff at the time testified that on November 11, 1963, he and plaintiff discovered Haywood with a P & S book open on his desk. Some 200 pink P & S slips were piled on the desk and the floor. The witness testified that "about seven" of these slips had numbers between 870 and 880 and had writing on them. Plaintiff and his attorney warned Haywood about interfering with records involved in a court case and then examined 22 P & S books including the oats book which originally contained numbers 851 to 900.

Haywood conceded that he had torn blank P & S pages from several books. He testified that prior to November 2, 1959, B & M kept separate P & S books for each type of commodity. These books were bound and there

was a white original and a pink carbon duplicate for each of 50 consecutively numbered slips. Haywood testified that after November 2, 1959, B & M changed its system and used only one P & S book for all commodities. He stated that in December 1959, he had removed numerous blank and unused slips remaining in some 25 to 40 P & S books no longer in use. This included a book used for oats trades only which had pages numbered 851 through 900.

We find an inconsistency between the testimony of these witnesses. If Haywood was correct and these pages from the oats P & S book were innocently destroyed in 1959, it would indeed have been difficult for the attorney to have seen these same slips in 1963. If we were to attempt to resolve this issue, it could best be classified as an instance of the deteriorating condition of Haywood's intellect at the time of his testimony. However, we need not make this attempt because there is no evidence of any kind that plaintiff ever participated in any transaction involving oats. Our own search of all of the mass of exhibits in evidence discloses no trade by plaintiff in oats and he does not make such claim in his testimony. It follows necessarily that the P & S slips from the oats book in question would shed no light upon the merits of this case and would not assist plaintiff's claim in any manner. Furthermore there is no transaction before us and no claim advanced by plaintiff as to which absence of a P & S slip had any material effect. An exhibit containing a mass of pink duplicates of P & S slips covering plaintiff's transactions from May of 1958 to May 12, 1960, was marked for identification by plaintiff. Haywood identified these documents as having been assembled by him by removal from the P & S books. With the exception of a few of these slips which plaintiff

apparently deemed material, none of the remaining sheets were offered in evidence by him.

During 1963 and early 1964, the accounting firm of Price, Waterhouse and Company conducted an audit of plaintiff's accounts with B & M at the request of counsel for the Board defendants. The certified public accountant who supervised this examination testified that the audit covered plaintiff's trading cards, P & S slips, position journals, general ledger accounts, and related take-off sheets for plaintiff's accounts Nos. 11, 15 and 35 for the years 1958, 1959 and 1960. He testified without objection that he recalled no instances of missing trading cards, incorrect posting of data from trading cards to takeoff sheets, failure to close out any open position, or any missing P & S slips.

Two other circumstances must be considered. As shown, plaintiff was a man of broad and detailed experience in commodity trading in many countries over many years. To our mind, it is absolutely inconceivable that a person of this background and experience would have never known in complete detail exactly how he stood during each day of trading. Without knowing his position at the opening of the day, it hardly seems likely that any trader would have known whether to buy or sell and in what quantities. It is equally incomprehensible that plaintiff could have suspected for so long that he was being deliberately defrauded, as he contends, but continue to trade with the same firm in the same manner for several months without actually obtaining this basic information of which he now claims to have been deprived.

Secondly, and of even greater importance, it must be remembered that all of these transactions were the sub-

ject of close examination before a committee of men who were qualified experts in the type of business here involved. The very nature of the unusual dealings which constitute futures trading in commodities necessarily makes difficult for lawyers and judges the scrutiny of these matters which are commonplace and elementary to the type of knowledgeable men who sat in arbitration. After an exhaustive review of the entire situation they reached a decision which should not be lightly set aside without clear and convincing evidence of fraud.

While Haywood was undergoing treatment for rehabilitation from alcoholism and on April 6, 1971, he wrote a letter to plaintiff in which he requested plaintiff's forgiveness for any trouble that his conduct has caused plaintiff. Haywood testified that in writing this letter he was following one of the steps in the accepted creed of Alcoholics Anonymous and that he wrote the letter to plaintiff in attempting to comply with this tenet. Haywood testified that he wanted plaintiff's forgiveness for harsh words and unfriendly conduct that might have occurred between them and wished to express the fact that he was sorry for the deterioration of his friendship with plaintiff. The trial court construed this letter as tantamount to a confession of guilt and expressed the opinion that it revealed a desire by Haywood to seek forgiveness for financial damage which he had perpetrated upon plaintiff.

In analysis of the letter and its consideration with all of the many facts which appear from the voluminous record, we cannot ascribe that type of importance to Haywood's letter. We cannot say that this letter is either direct or indirect evidence of any kind of the commission of any fraud by Haywood. Finally, it must be remembered that this record does not show how Haywood him-

self could have benefited in the slightest degree financially, or otherwise, from any fraudulent activities such as concealment or manufacture of records.

Defendants urge that extrinsic fraud such as prevents a fair adversary hearing is the only species of fraud that will justify setting aside an arbitration award, citing *Kirschner* v. *West Co.* (E. D. Pa 1945), 247 F. Supp. 550, *aff'd,* 353 F. 2d 537, *cert. denied,* 383 U.S. 945; *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.* (3d Cir. 1968), 397 F. 2d 594; *French* v. *Raymond* (1909), 82 Vt. 156, 72 A. 324. We have found no Illinois case which expressly considers this issue. In view of our conclusion that the arbitration award was not procured or tainted by fraud of any kind, a conclusive determination of this narrow question is unnecessary to this appeal.

We are obliged to conclude that the evidence adduced by plaintiff in this entire massive record is not sufficient to show fraud. On the contrary, the records kept by defendants in the usual course of business and other documents which they introduced show clearly and convincingly that no fraud was practiced by defendants and that plaintiff actually sustained the trading losses reflected in the records of his account. Under these circumstances, neither the trial court nor this court has authority to make any disposition of the rights of plaintiff and Morrison other than that reached in the award issued by the Committee of Arbitration and duly affirmed by the Committee of Appeals

Since defendants Baggot and Haywood were not parties to the arbitration, we will not apply this legal theory to their situation. In our opinion, the conclusion is manifest from all the evidence before us, which we have

detailed and analyzed, that neither Baggot nor Haywood committed fraud of any kind or participated in a conspiracy which could serve as a proper basis for liability to plaintiff. Here, too, the accounting records kept in the ordinary course of business serve to establish affirmatively the absence of such basis for liability on the part of Baggot and Haywood.

In his brief, plaintiff raises the point that he stood in a fiduciary relationship with Baggot and Morrison "imposed by a business arrangement" and also based on a purported personal relationship and friendship. There is no specification as to whether this alleged relationship of trust also existed with defendant Haywood. Plaintiff urges that a transaction between parties in a relationship of trust and confidence is presumptively fraudulent, citing *Matanic* v. *Krajach* (1946), 392 Ill. 547, 551, 64 N.E. 2d 885. Under this rule, the burden would shift to defendants to prove by clear and convincing evidence that their transactions with plaintiff were not fraudulent. Defendants reply to this argument with the contention that this issue was never raised, considered or decided at trial.

In our opinion, the validity of this reply by defendants is demonstrated by *Kravis* v. *Smith Marine, Inc.* (1975), 60 Ill. 2d 141, 324 N.E. 2d 417. In *Kravis,* the court announced once more the established legal principles that a party may not change the theory which he presents to a court of review from the position which he took at trial. Consequently, "an issue not presented to or considered by the trial court cannot be raised for the first time on review." (60 Ill. 2d 141, 147.) The court also observed that an appellee may "defend a judgment on review by raising an issue not previously ruled upon by the trial court if the necessary factual basis for the

determination of such point was contained in the record." 60 Ill. 2d 141, 147.

This rule is based upon an effort to avoid manifest unfairness to an appellant. This court was held that, "An appellate court should not consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial." (*Cronin* v. *Delta Airlines, Inc.* (1974), 19 Ill. App. 3d 1073, 1077, 313 N.E. 2d 245.) In this regard, it is fundamental that an issue is presented at trial by a combination of pleadings and evidence. "To have evidence without pleading an issue is just as fatal as pleading an issue and not supporting it with evidence. Both are essential and each must conform to the other." (*Consoer, Townsend & Assoc.* v. *Addis* (1962), 37 Ill. App. 2d 105, 110, 185 N.E. 2d 97. See also *Broberg* v. *Mann* (1965), 66 Ill. App. 2d 134, 137-39, 213 N.E. 2d 89.) In the case before us, the issue of the existence of a fiduciary relationship between plaintiff and members of the firm of B & M was never presented to the trial court.

Although the foregoing points are decisive of this issue, we note that even if Baggot and Morrison were fiduciaries so that the burden of proof shifted to them, the record contains affirmative proof amounting to clear and convincing evidence which would rebut the presumption and would demonstrate effectively that the transactions were not fraudulent but that the dealings between plaintiff and defendants were fairly conducted.

In view of the conclusions above stated, we do not find it necessary to consider or decide any of the remaining contentions advanced as regards the liability of defendants Baggot, Morrison and Haywood. For example, we have not considered the special arguments

concerning liability advanced by the defendant James E. Baggot, Jr., and adopted by Harris Haywood, nor have we considered the points raised by defendants pertaining to the damages assessed against them.

The judgment order entered January 12, 1972, finding the issues against plaintiff and in favor of the members of the Committee of Arbitration and each of them, James J. Coughlin, the Board of Trade and the officers thereof, is affirmed. The judgment order entered August 17, 1972, for judgments in various amounts of actual and exemplary damages in favor of plaintiff and against the defendants James E. Baggot, Jr., Donald W. Morrison and Harris Haywood and each of them, is reversed and the cause is remanded with directions for entry of judgment in favor of said three defendants and against plaintiff.

Affirmed in part, reversed in part and remanded with directions.

BURKE and LORENZ, *JJ.*, concur.

State Of Illinois
Office Of
CLERK OF THE SUPREME COURT
Springfield
62706

January 28, 1977

Mr. William J. Harte
Attorney at Law
111 W. Washington Street
Chicago, Ill. 60602

No. 49078—Bernard Rosee, petitioner, vs. Board of Trade of the City of Chicago, an Illinois corporation, et al., respondents. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause. Mr. Justice Dooley took no part.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 20, 1977

William J. Harte, Esquire
111 West Washington Street
Suite 1137
Chicago, Illinois 60602

Re: Bernard Rosee v. Board of Trade
of the City of Chicago, et al.
A-862

Dear Mr. Harte:

Your application for an extension of time in which to file a petition for writ of certiorari in the above-entitled case has been presented to Mr. Justice Stevens who, on April 19, 1977, signed an order extending your time to and including June 27, 1977.

A copy of the Justice's order is enclosed.

Very truly yours,
Michael Rodak, Jr., Clerk
by /s/ Francis J. Lorson
Francis J. Lorson
Deputy Clerk

th
Enc.

cc: Leonard Ring, Esquire
Daniel Hoseman, Esquire
Dom J. Rizzi, Esquire
Kirkland & Ellis
Schultz & McElligott
Coffield & Ungarretti, Ltd.

Supreme Court of the United States

No. A-862

BERNARD ROSEE,
Petitioner,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including June 27, 1977.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 19th
day of April, 1977.

APPENDIX "B"

STATEMENT OF FACTS APPEARING IN BRIEF PRESENTLY BEFORE THE ILLINOIS APPELLATE COURT IN PETITIONER'S SECTION 72 PROCEEDINGS

In 1963, Petitioner brought an action in tort for conspiracy, fraud, misrepresentation, defamation, malicious interference with occupation and breach of fiduciary relationship against James E. Baggot, Jr., and Donald W. Morrison (individually and d/b/a Baggot & Morrison), Harris Haywood, the Board of Trade of the City of Chicago (hereinafter "Board of Trade"), and various officers and members of the Board of Trade, including those who served as members of its Committee of Arbitration. At the close of plaintiff's evidence, the Board of Trade and those of its officers and members named as defendants (hereinafter jointly referred to as the Board of Trade defendants) were dismissed on the ground that plaintiff ha failed to establish a *prima facie* case. Judgment was later entered in plaintiff's favor against the remaining defendants in the amount of $699,139.42; however, that judgment was later reversed by this court in *Rosee* v. *Board of Trade of the City of Chicago, et al.*, No. 58379. A Petition for leave to appeal that decision was subsequently denied by the Supreme Court of Illinois.

While the aforementioned appeal was pending, petitioner initiated the Section 72 proceedings which give rise to the instant appeal in an effort to vacate the order dismissing the Board of Trade defendants. In support of the Petition, appellant submitted newly discovered documentary evidence, not available to the plaintiff at the time

of trial, and alleged that the newly discovered evidence supports plaintiff's original claim (a) that the conduct and outcome of the Board of Trade arbitration hearing was preordained, and was designed to protect defendants Baggot, Morrison and Haywood, and to conceal the fraud that has been perpetrated upon Petitioner by them; (b) that the failure of the Board of Trade properly to oversee the conduct of Baggot & Morrison, the Board having been placed on explicit notice of violations by that firm in the handling of customers' accounts, constituted deliberate malfeasance; and (c) that key members of the Board of Trade were active conspirators with other defendants in staging a sham arbitration hearing in order to oust Rosee from the Board of Trade and to permit Baggot & Morrison to illegally obtain and retain substantial sums of money owed to Rosee by said defendants.

In addition to the documents attached to the Section 72 petition, various other documents were submitted to the court in the course of hearings before Judge Cohen. Included among the documents discovered subsequent to trial, and attached to the Section 72 Petition (C-1 to C-35) were various memoranda and pieces of correspondence showing that at the time the arbitration proceedings were being conducted the government investigators and the Board's Arbitration Committee were in continuous communication with one another. The newly discovered documents disclosed that, prior to the completion of the arbitration proceedings.

It is also significant, as pointed out in this correspondence between Gordon and Robinson, CEA Washington, (Exhibits A through C attached to the petition) that Gordon was in constant communication, in person, with Sidney Hamper, who was Chairman of the Arbitration Committee. (See deposition of Mr. Gordon, April 7-8, 1965, pp. 109, 110, 112, 122 through 129).

Exhibit G (C-19 to C-20) to the 72 Petition, also a newly discovered document, is a copy of a letter from Acting Assistant General Counsel Carl Bullock to Attorney General Robert F. Kennedy. It discloses that based upon C. E. A. investigation of Baggot & Morrison, violations of the Commodity Exchange Act were disclosed. However, criminal prosecution was not recommended because "We understand from officials of the Commodity Exchange Authority that no customer suffered any financial loss as a result of the violations". The investigating agents of the CEA knew that the above statement was false.

Exhibit I (C-24 to C-27) to the §72 Petition is an excerpt from the transcript of the original trial setting forth testimony of Albert C. Christian, then President of the Chicago Board of Trade Clearing Corporation and a defense witness at trial, to the effect that no requirement existed requiring the Board of Trade to submit "bought and sold sheets", designating the trades for the day separately as "house trades", on the one hand, by quantity, item and amount, and "customers' trades" on the other hand. One of the newly discovered documents attached to the petition was a September 1, 1937 Commodity Exchange Administration letter (Exhibit Ia) (C-25) stating that "we do not see how a futures commission merchant can mix his own house trades with customers' trades in the Clearing House without sometime finding himself in the position of having violated those provisions of the Commodity Exchange Act which prohibit the comingling of customers' funds with the funds of the commission merchant and which prohibit the use of money or property belonging to one customer to margin or secure the trades or contracts of any other person".

The letter states that "the only safe course for a futures commission merchant having both house trades and customers' trades is to clear them separately under two distinct account designations".

THE INVOLVEMENT OF THE BOARD OF TRADE IS REVEALED: The involvement of the Board of Trade is revealed by the following in 1965, five years after commencement of the Arbitration proceedings, and seven years after Rossee's account with Baggot and Morrison had been opened, the Board of Trade, through its lawyers, Kirkland & Ellis, had Jack Levin, a member of that firm, order an accountant (William Young of Price, Waterhouse) to make a purported audit of Rosee's account to the end of September, 1959. The Board of Trade paid $6,000.00 to create this fraudulent audit. (Tr.; 1/4/72). These are the very same fraudulent documents that Lebeck turned over to Kirkland & Ellis. The audit of these fraudulent documents showed a deficit in September, 1959 of $32,886.76.

The following reveals the fraud perpetrated on Rosee by the Board of Trade.

(1) Mr. Morrison stated that Rosee's two accounts were in order up until some place in October of last year (1959)" (Arbitration at P. 51)

(2) Mr. Baggot testified as follows: "I would say in September (1959) Rosee was in good shope" (Arbitration at P. 463).

These facts conclusively prove that the documents supplied by Lebeck to Kirkland & Ellis, out of which the Price Waterhouse audit was derived, were false and fraudulent.

From the same fraudulent documents Lebeck supplied, each of the CEA agents reported a deficit as follows:

Gordon report	3/31/60	$45,845.85
Pialia (Schiffman report)	3/9/60	$45,845.85
DeWitt report	2/29/60	$45,845.85

All claimed the same amount, *but* for totally different dates. Yet during the trial on December 28, 1971, Baggot and Morrison's own ledger sheets introduced as exhibits 69, 67, and 67(a) showed that Rosee had a *credit* on March 8, 1960, of $7,307.50. Therefore, again, the fraud and conspiracy of Coughlin, Lebeck and Hamper and the rest of the Arbitration Committee is revealed crystal clear and beyond a shadow of a doubt.

LEBECK AND COUGHLIN HAD ALL THE TRUE RECORDS OF BAGGOT AND MORRISON.

Lebeck and Coughlin had possession of all the thirty boxes of Baggot and Morrison's records. Lebeck and Coughlin suppressed these records to conceal the fraud and replaced them with fraudulent documents that were compiled a few days prior to the October 12, 1960 hearing, which was two and one half months after commencement of the Arbitration Proceeding. According to Morrison's brief, (p. 34) filed in 1973, in the Appellate Court, Morrison stated that in May, 1960, when they went out of business, *all* of Baggot and Morrison's records (approximately thirty boxes) went from their offices to storage in the Board of Trade Building, then to Lebeck's office in the Board of Trade Building, and from there to the offices of Kirkland & Ellis, attorneys for the Board of Trade.

In addition, Mr. Don Rizzi, attorney for Mr. Morrison, in oral arguments before the appellate Court on July 7, 1976, distinctly stated that when Baggot & Morrison went out of business in May, 1960, Baggot and Morrison's records went to the warehouse in the

Board of Trade Building, from there to Lebeck's office in the Board of Trade, and from there they went to the office of Kirkland & Ellis.

The above evidence proves the fraudulent concealment of evidence and records by the defendant Board of Trade.

ROSEE HAS DISCOVERED ADDITIONAL EVIDENCE OF CHRISTIAN'S FALSE TESTIMONY WITH RESPECT TO THE SETTLEMENT SHEETS.

As noted in Rosee's Sec. 72 petition, Christian, President of the Clearing House of the Board of Trade, responding, under oath, to a question by Judge Cohen, stated as follows:

> "(there) is no requirement of any kind or description which places an obligation upon the House to submit bought and sold sheets which designate the trades of the day as house trades on the one hand, by quantity, item, account, and customer's trades on the other hand." (Tr. 6/24/71 at 161-162).

In other words, Mr. Christian assured the Court that he was not aware of any obligation on the part of a commodity broker to segregate house accounts from customer's accounts.

Christian also testified before Judge Cohen on June 24, 1971 that the Board of Trade Clearing Corporation provided the settlement sheet forms to clearing members "at a cost", (Tr. at 146) that the standard forms, if in compliance with the segregation rule, could have required by the statute a separate sheet for a house account and a separate sheet for a customer's account. Instead of using the standard forms as required by the statute, the Board of Trade deliberately employed a single form in order to comingle customer and house trades, and thereby

prevent Rosee from tracing his trancations. This was a criminal violation of the Commodity Exchange Act.

The court already has abundant evidence to the effect that it was mandatory that a Commodity Broker maintain separate and segregated settlement sheets and not comingle house and customer accounts.

The following confirms that the Board of Trade supplied Rosee with approximately 800 fraudulent settlement sheets on or about May, 1970.

1. December 22, 1975 proceeding, page 69, a government circular was introduced (Exhibit 42), showing that there must be two separate settlement sheets;
2. September 23, 1975, Mr. Laniosz of Peavey & Co., testified that two separate settlement sheets are required (see pages 7 to 42, exhibits 1-5);
3. February 26, 1964, Mr. Albert W. Kibby of the CEA testified in a deposition (pages 26-28) that they get confirmations from the Clearing House, one for the House account and one for the Customer's account.
4. December 23, 1975, Mr. Piala of the CEA testified (pages 24-25) that there must be two separate settlement sheets;
5. See affidavit of Harry Fortes, attached to the petition, stating that there must be two separate settlement sheets;
6. Haywood, managing bookkeeper of Baggot and Morrison testified that two separate settlement sheets were kept. (Tr. 12/20/71 at 77).

Found in Gordon's file in the Appellate Court record on the pending appeal of this cause, there is a circular from the Commodity Exchange Administration in Wash-

ington, addressed to "All Futures Commission Merchants", enclosing "an example of the accounting procedure necessary to segregate customer's funds in compliance with the provisions of Sec. 4d(2) of the Commodity Exchange Act." (see the circular of February 18, 1938," was among the papers which Leback had all along and turned over to Gordon and the other CEA agents.

From the above evidence it is clear that there was perjured testimony on the part of Mr. Christian, in order to defraud the plaintiff.

The newly discovered evidence, obtained from the Department of Agriculture on October 7, 1975, reveals that Baggot & Morrison were in "shaky" financial condition as early as 1958.

Office Memorandum. UNITED STATES GOVERNMENT

DATE: September 12, 1958

To: Alex C. Caldwell, CEA, Washington

FROM: Albert W. Kibby, CEA, Chicago
Acting in Charge

SUBJECT: Baggot & Morrison

Attached hereto is the report and work papers covering the examination of the records of the subject as of June 30, 1958.

I think the condition of the records of Baggot & Morrison were discussed with you while you were in Chicago a month or so ago. At that time we were hoping that they would hire a bookkeeper to get their books in order. They finally hired one a couple of weeks ago, how competent we don't know. It looks like they might work out alright, but, we will have to give them more time.

I have been holding this report here with the idea in mind that the records would be properly adjusted and that we could comment on the fact accordingly. However, it was decided to submit A.A. No. 1998-A now and ask for another assignment covering another examination for about October 31.

Attachment.

Albert W. Kibby, CEA, Chicago September 15, 1958

Alex C. Caldwell, CEA, Washington

Baggot & Morrison

As requested in your memorandum of September 12, I am enclosing audit assignment 1998-B to cover the followup examination of Baggot & Morrison. Mr. DeWitt's report certainly indicates the need for such a followup. ACCaldwell:cks

Albert W. Kibby, CEA, Chicago December 1, 1958

Alex C. Caldwell, CEA, Washington

A.A. 1998-B—*Baggot & Morrison*

I am glad to see that there is at least some improvement in the manner in which Baggot & Morrison's records are being kept. However, it seems to me that they still have a long way to go before the records are in proper shape. I will be very interested in hearing if there is any further improvement in the records by the time you make your visit to the company's office sometime during this month. It seems to me that as long as the company is operating in a rather unorthodox manner and as long as its financial position is rather shaky, it might be well for you to make such an informal visit to the company's office every 2 or 3 months. Since they are located in the Board of Trade Building, I assume that such a visit would not require too much of your time.

ACCaldwell:cks

Albert W. Kibby, CEA, Chicago December 24, 1958

Alex C. Caldwell, CEA, Washington

Baggot & Morrison

Attached is a November 28, 1958 trial balance submitted by Baggot & Morrison in connection with their registration for 1959. As you will note, the unhealthy financial condition of the company which you noted in your audit as of October 31, 1958, did not improve any during the month of November. I am aware that you are planning a follow-up visit sometime during this month but thought you would be interested in seeing the attached trial balance. Please return the trial balance to us whe you have finished with it.

Attachment

ACCaldwell/agm

FILED
JUL 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1867

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

and

JAMES E. BAGGOT, JR., AND DONALD W. MORRISON, INDIVIDUALLY AND d/b/a BAGGOT & MORRISON, AND HARRIS HAYWOOD,

Respondents.

BRIEF OF BOARD OF TRADE RESPONDENTS* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

JOHN E. ANGLE
JOHN H. STASSEN
Attorneys for Board of Trade Respondents

* Board of Trade of the City of Chicago; Sidney C. Hamper, Martin H. Milek (Deceased), Roy C. Loftus, Richard Rose, Raymond Comenzo, and Thomas Herr, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; Julius Mayer, Wilbert E. Huge (Deceased); Robert L. David; Thomas E. Hosty (Deceased); Robert C. Liebenow, individually and as President of the Board of Trade of the City of Chicago; Warren W. Lebeck, individually and as Secretary of the Board of Trade of the City of Chicago; and James J. Coughlin.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
STATEMENT	1
Jurisdiction	2
Questions Presented for Review	3
Constitutional Provision Involved	4
Statement of the Case	5
Findings by the Trial Judge	7
Findings by the Appellate Court	8
ADDITIONAL REASONS FOR DENYING THE PETITION	8
CONCLUSION	9

TABLE OF AUTHORITIES.

Cases.

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 9

Case & Co. v. Board of Trade of the City of Chicago, 523 F.2d 555 (7th Cir. 1975) 9

Lagorio v. Board of Trade of the City of Chicago, 529 F.2d 1290 (7th Cir. 1976), cert. denied, 426 U.S. 950 (1976) 9

Rosee v. Board of Trade of the City of Chicago, 311 F.2d 524 (7th Cir. 1963), cert. denied, 374 U.S. 806 (1963) 2, 3, 4

Rosee v. Board of Trade of the City of Chicago, No. 63 C 1348 (N.D. Ill. 1966), aff'd, U.S. Ct. of Appeals (7th Cir.), Nos. 15886 and 16373, cert. denied, 393 U.S. 1055 (1969), rehearing denied, 393 U.S. 1124 (1969) 2

Rosee v. Board of Trade of the City of Chicago, 43 Ill. App.3d 203 (1st Dis. 1976), appeal denied, ... Ill.2d ..... (1977) 2, 3, 4

Rosee v. Bergland, Civil No. 76-1721, U.S. Dis. Ct. (D.C.), dismissed April 26, 1977 2

Ryan v. Cudahy, 157 Ill. 108 (1895) 9

Smith v. Smith, 28 Ill. 56 (1862) 9

Wechsler v. Gidwitz, 250 Ill.App. 136 (1928) 9

Statutes.

7 U.S.C., §§ 1-21 4

28 U.S.C., §§ 1254, 1257 2

Ill. Rev. Stat., Ch. 110, §§ 41, 72 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1867

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

and

JAMES E. BAGGOT, JR., AND DONALD W. MORRISON, INDIVIDUALLY AND d/b/a BAGGOT & MORRISON, AND HARRIS HAYWOOD,

Respondents.

BRIEF OF BOARD OF TRADE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This case is essentially an accounting dispute between a professional commodity trader (Bernhard Rosee) and his brokerage firm (Baggot & Morrison) which Rosee has attempted over the years to transform into a *cause celebre*. The dispute arose 18 years ago when Rosee and Donald Morrison, through arbitration at the Chicago Board of Trade, sought to resolve questions concerning a trading debit. Despite the dramatics which

Rosee has employed, this action is at heart a routine controversy over whether a debt exists.

Notwithstanding this case's basically mundane nature, it has, in the course of 17 years and in various trappings, been before the Superior and Circuit Courts of Cook County, Illinois, the United States District Court for the Northern District of Illinois (twice), the United States Court of Appeals for the Seventh Circuit (twice), the Appellate Court of Illinois, the Illinois Supreme Court, and, on two occasions, this Court (on petitions for certiorari, both of which were denied).[1]

It is now before this Court a third time. We respectfully submit that this latest petition for writ of certiorari is without merit and should be denied, as were Rosee's previous petitions to this Court.

Jurisdiction

Rosee states in his Petition (page 2) that the "jurisdiction of this Court is involved [sic] pursuant to 28 U.S.C. Sec. 1254." Section 1254 is inapplicable, however. It relates solely to review of cases in the Federal courts of appeals. We must assume that Rosee intended to invoke section 1257 of Title 28 ("State

1. See, *e.g.*, *Rosee* v. *Board of Trade of the City of Chicago*, 311 F.2d 524 (7th Cir. 1963), *cert. denied*, 374 U.S. 806 (1963); *Rosee* v. *Board of Trade of the City of Chicago*, No. 63 C 1348 (N.D. Ill. 1966), *aff'd*, U.S. Ct. of Appeals (7th Cir.), Nos. 15886 and 16373, *cert. denied*, 393 U.S. 1055 (1969), *rehearing denied*, 393 U.S. 1124 (1969); *Rosee* v. *Board of Trade of the City of Chicago*, 43 Ill.App.3d 203 (1st Dist. 1976), *appeal denied*, ... Ill.2d ..... (1977). In addition, the matter has been reviewed by both the Commodity Exchange Commission and its successor, the Commodity Futures Trading Commission. A further extension of this cause, a 1976 suit brought by Rosee in the United States District Court for the District of Columbia, was dismissed on April 26, 1977 on grounds of *res judicata* and collateral estoppel, the Court concluding, *inter alia*, that "Mr. Rosee has had his day in Court." Memo. Order, p. 5, *Rosee* v. *Bergland*, Civil No. 76-1721. (Indeed, he has had 17 years in every conceivable court and before every conceivable administrative agency.) Rosee has appealed, and the matter is currently pending before the United States Court of Appeals (D.C.Cir.).

courts; appeal; certiorari"), which provides for review by writ of certiorari of "final judgments or decrees rendered by the highest court of a State in which a decision could be had" where, *inter alia*, "any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Yet Rosee, on page 1 of his Petition, prays for review of the judgment of the Appellate Court of Illinois, and not the order of Illinois Supreme Court denying his petition for review by that court.[2]

Questions Presented for Review

Rosee's statement of the questions presented for review (Petition, page 2) assumes as fact several of the very matters which have been decided against him. First, contrary to his statement, he was not compelled to arbitrate, and the arbitration proceeding was not mandatory. *Rosee* v. *Board of Trade of the City of Chicago*, 43 Ill.App.3d 203, 232-33 (1976) [reprinted in Petitioner's Appendix (hereafter App.), pp. 38a-39a]; see also *Rosee* v. *Board of Trade of the City of Chicago*, 311 F.2d 524, 525-26 (7th Cir. 1963), *cert denied*, 374 U.S. 806 (1963). Second, contrary to his statement, the arbitration proceedings did not fail to provide "fundamental procedural safeguards and rights." *Rosee*, 43 Ill.App.3d at 238 (App., p. 47a); see also *Rosee*, 311 F.2d at 528, 529.

Additionally, Rosee asserts that he was precluded from litigating his claims in a court of competent jurisdiction. This asser-

2. Rosee refers in his Petition on page 2 under the heading "Jurisdiction" to the order of the Supreme Court of Illinois "denying leave to appeal from the Appellate Court of Illinois."

Rosee's petition to the Illinois Supreme Court, however, was for "appeal as a matter of right" or, *in the alternative*, "leave to appeal." In denying Rosee's petition, the Illinois Supreme Court necessarily concluded that Rosee's petition did not present a question under the United States or Illinois Constitutions that "arises for the first time in and as a result of the action of the Appellate Court." Ill. Const., art. VI, § 4(c); Rule 317, S. Ct. of Ill.

tion is simply ridiculous, since for 17 years Rosee has been litigating his claims before the full panoply of state and Federal courts. See, *e.g.*, Note 1, *supra*.

Furthermore, Rosee asserts that the Chicago Board of Trade "has virtual total economic life and death control over commodity trading." This assertion is likewise ridiculous. See, *e.g.*, the Commodity Exchange Act, 7 U.S.C. §§ 1-21.

Lastly, Rosee asserts, without clarification, that the Appellate Court of Illinois "set aside the decision of the trial court." The fact is, however, that the Appellate Court, with regard to the Board of Trade Respondents herein, *affirmed* the judgment of the trial court. *Rosee*, 43 Ill.App.3d at 239 (App., pp. 49a-50a).

Shorn of all these misstatements, the question which Rosee presents to the Court for review would appear to simply be whether the Appellate Court of Illinois and the Illinois Supreme Court were *wrong* in exercising (or declining to exercise) their constitutional and statutory review powers in a manner unsatisfactory to Rosee. Manifestly, this is not a question which merits review by this Court.

Constitutional Provision Involved

Rosee cites, on page 3 of his Petition, the Fourteenth Amendment as the "Constitutional Provision Involved." The Court should be aware that Rosee has previously invoked the Fourteenth Amendment in connection with this dispute, but without success. *Rosee* v. *Board of Trade of the City of Chicago*, 311 F.2d 524, 525, 528 (7th Cir. 1963), *cert. denied*, 374 U.S. 806 (1963). This particular case, however, was framed and tried as a "conspiracy to defraud" case, not as a "due process" case. See *Rosee*, 43 Ill.App.3d at 212-213 (App., pp. 5a-6a).

Statement of the Case

Rosee's Statement of the Case is incomplete, misleading, false in part, slanted, and contains matters outside the record. For example:

1. Rosee fails to indicate why the Board of Trade Respondents were dismissed by the trial court at the conclusion of Rosee's case (Pet., p. 4).

   The fact is that they were dismissed because Rosee had failed to establish by creditable or competent testimony a *prima facie* case against them. See *Rosee*, 43 Ill.App.3d 238 (App., p. 48a).

2. Rosee fails to indicate why the Appellate Court of Illinois affirmed the judgment of the trial court in favor of the Board of Trade Respondents (Pet., p. 4).

   The fact is that judgment was affirmed because Rosee had totally failed to meet his burden of proof. In the opinion of the Appellate Court, none of Rosee's allegations were supported by the evidence. *Rosee*, 43 Ill. App.3d 239 (App., pp. 49a-50a).

3. Rosee speaks of his "nineteen-year fight." (Pet., p. 4.)

   It should be noted that not once in these "nineteen years" has any tribunal found the Board of Trade Respondents guilty of any wrongdoing whatsoever.

4. Rosee states as fact that a conspiracy was formed to silence him (Pet., p. 5).

   There is absolutely no evidence in the record of this case to support this charge.

5. Rosee states as fact that Baggot and Morrison systematically cheated and defrauded him and furnished false and manipulated records to him (Pet., pp. 5 and 6).

   After an exhaustive review of the record, however, the Appellate Court of Illinois concluded otherwise. *Rosee*, 43 Ill.App.3d at 248 (App., pp. 64a).

6. Rosee insists that original records relating to his trades were never produced (Pet. p. 6).

   This is simply not true. See, *e.g.*, *Rosee*, 43 Ill.App.3d at 233-35 (App., pp. 39a-43a).

7. Rosee again asserts that Board of Trade Rule 30 provides for mandatory arbitration (Pet., p. 6).

   This, too, is not true. See, *e.g.*, *Rosee*, 43 Ill.App.3d at 232 (App., p. 38a).

8. Rosee rehashes a number of the allegations he has repeatedly made (but has never substantiated) concerning the 1960 arbitration (Pet., pp. 6-8).

   These allegations, however, were definitively reviewed by the Appellate Court of Illinois and simply found to be without any factual basis. *Rosee*, 43 Ill.App.3d at 230-239 (App., pp. 34a-50a).

9. Rosee discusses the failure of "defendants" to produce certain "segregation records." (Pet., pp. 9-12.)

   His reference to "defendants" is misleading; the Board of Trade Respondents are not involved in this aspect of the case. In any event, the Appellate Court fully reviewed Rosee's contentions in this regard and found them deficient. *Rosee*, 43 Ill.App.3d at 245-46 (App., pp. 59a-60a).

10. Rosee asserts that certain "worksheets" were "manufactured" especially for an arbitration hearing (Pet., p. 14).

    This assertion in false. *Rosee*, 43 Ill.App.3d at 242 (App., p. 54a).

11. Rosee refers to proceedings commenced by him under Section 72 of the Illinois Civil Practice Act (Ill. Rev. Stat., Ch. 110, § 72) alleging "newly-discovered evidence" of fraud. In this connection, portions of his

brief currently before the Illinois Appellate Court are reprinted in the Appendix to his Petition (Pet., pp. 14-15).[3]

Rosee fails to point out, however, that these Section 72 proceedings were decided against him by the trial court, and that it is Rosee who has appealed to the Appellate Court. The trial court concluded, on March 4, 1976, that neither Rosee's "newly discovered evidence," nor the other evidence adduced at evidentiary hearings before the court, contained a "scintilla of creditable or competent evidence that the Respondents or any of them conspired or acted in concert with other defendants in this case, with employees of the Federal government, or with any person or persons, to defraud Petitioner, to impair his livelihood, or to do him any wrong whatsoever."

12. Rosee states that the trial court, as recently as May and June of this year, ordered the Board of Trade to produce "certain records which would exonerate petitioner once and for all." (Pet., p. 15.)

    This statement is false. The Board of Trade has no such records, and affidavits to that effect have been filed with the trial court.

Findings by the Trial Judge

Again, on page 15 under the heading "Findings by the Trial Judge," Rosee lumps all the defendants together in a most misleading fashion and fails totally to recognize the fact that the trial judge found in favor of the Board of Trade Respondents, and that the trial judge's comments were not addressed to any of the Board of Trade Respondents.

3. The arguments advanced in Rosee's brief currently before the Illinois Appellate Court have no factual or legal foundation. Accordingly, Respondents have requested that that court impose sanctions on Rosee pursuant to Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., Ch. 110, § 41).

Findings by the Appellate Court

Rosee asserts on page 17 that the Appellate Court "disregarded" all of the evidence. To the contrary, it thoroughly and meticulously reviewed and considered all of the evidence, as even a cursory review of the court's lengthy opinion will demonstrate.

ADDITIONAL REASONS FOR DENYING THE PETITION

Rosee's argument for granting his petition is without merit. He purports to find "state action" in the opinion of the Appellate Court itself and his reading of Illinois law. He asserts that the Illinois Appellate Court's decision denied him due process of law, first, by "holding that issues decided by the Arbitration Committee were conclusively resolved and were not subject to contrary determination by the trial court," and second, by substituting "its findings of fact for those of the trial court" (Pet., pp. 18, 29).

Rosee, however, misstates the holding of the Appellate Court. That court expressly recognized that an arbitration award can be overturned if it is obtained by fraudulent means. *Rosee*, 43 Ill.App.3d at 240 (App., p. 51a). The court then proceeded in detail to review the evidence at trial to determine whether the trial court's apparent determination that Morrison had obtained the award by fraudulent means was supported by the record. The Appellate Court concluded that it was not. 43 Ill.App.3d at 248 (App., p. 64a). In making this determination *vis-a-vis* Baggot, Morrison, and Haywood (the court, it should be stressed, affirmed the trial court's judgment *vis-a-vis* the Board of Trade Respondents), the Appellate Court applied the standard for review established by Illinois law. We fail to see how this constitutes a denial of due process.

Furthermore, Rosee tries to create the false impression that the Chicago Board of Trade can do anything it desires and be

immune from judicial inquiry.[4] This is a gross perversion of what the law provides. See, *e.g.*, *Ryan* v. *Cudahy*, 157 Ill. 108, 122-24 (1895); *Case & Co.* v. *Board of Trade of the City of Chicago*, 523 F.2d 555 (7th Cir. 1975); *Lagorio* v. *Board of Trade of the City of Chicago*, 529 F.2d 1290 (7th Cir. 1976), *cert. denied*, 426 U.S. 950 (1976).

Furthermore, Illinois law has always overturned arbitration awards fraudulently obtained (and for other reasons), and Rosee has been allowed to litigate this question for years. See *Rosee*, 43 Ill.App.3d at 240 (App., p. 51a); *Ryan*, 157 Ill. at 119; *Smith* v. *Smith*, 28 Ill. 56, 59 (1862); *Wechsler* v. *Gidwitz*, 250 Ill.App. 136, 141 (1928). In any event, the scope of review of arbitration proceedings is solely a matter of state law and, whatever quantum of review is accorded, no constitutional question is raised. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298 (1956).

CONCLUSION

Rosee has shown no special and important reasons why a writ of certiorari should issue. This Petition, like his previous petitions, is without merit. Accordingly, the Board of Trade Respondents respectfully urge that Rosee's Petition for writ of certiorari be denied.

Respectfully submitted,

JOHN E. ANGLE
JOHN H. STASSEN
Attorneys for Board of Trade Respondents

Of Counsel:
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

4. A similar argument was advanced by Rosee in the predecessor to this case, and was rejected by the United States Court of Appeals for the 7th Circuit. *Rosee*, 311 F.2d 527-28, *cert. denied*, 374 U.S. 806 (1963).

Supreme Court, U. S.
FILED
AUG 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1867

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

and

JAMES E. BAGGOT, JR., AND DONALD W. MORRISON, INDIVIDUALLY AND d/b/a BAGGOT & MORRISON, AND HARRIS HAYWOOD,

Respondents.

BRIEF OF RESPONDENT JAMES E. BAGGOT, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEONARD M. RING,
RALPH L. BRILL,
Attorneys for Respondent, James E. Baggott, Jr.

LEONARD M. RING & ASSOC.,
111 West Washington Street,
Chicago, Illinois 60602,
(312) 332-1765,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
Introduction	1
Petitioner's Statement of the Case	4
Petitioner's Participation in the Arbitration Proceeding Was Completely Voluntary, Not Compulsory, as He Alleges	5
Petitioner's Claim That the Arbitration Proceedings Denied Him Due Process Is Completely Without Basis	8
Conclusion	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1867

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

and

JAMES E. BAGGOT, JR., AND DONALD W. MORRISON, INDIVIDUALLY AND d/b/a BAGGOT & MORRISON, AND HARRIS HAYWOOD,

Respondents.

BRIEF OF RESPONDENT JAMES E. BAGGOT, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Petitioner's arguments are baseless. The arbitration engaged in was not compulsory, as he contends, but rather voluntarily invoked by him; and every court, state and federal, which has reviewed the record of those proceedings[1] has found petitioner's

1. Rosee originally filed suit in the Superior Court of Cook County, Illinois, but took a voluntary non-suit after his request for

(Footnote continued on next page.)

charges of unfairness to be without merit. In any event, no federal question is present here, for the proceedings at the Board of Trade, a private association, do not constitute state action.

Moreover, petitioner has completely misstated the holding of the Illinois Appellate Court, from which he seeks to appeal. That Court did not hold, as he asserts, that the determination by the Board of Trade's arbitration panel was conclusive. What it held was that, as to those parties who participated in the arbitration proceeding, the Committee's determination was binding, unless it was tainted with fraud or unfairness; but that the record did not establish fraud or unfairness. (See Appendix, pp. 50a,

(Footnote **continued from preceding page.**)
an injunction compelling reinstatement to the Board of Trade *pendente lite* was denied. He next filed suit in the United States District Court, Northern District, Illinois, alleging denial of due process and equal protection and an implied cause of action under the Commodities Exchange Act. The action was dismissed on grounds that Rosee had not asserted a valid claim based on violation of federal rights. The Court of Appeals for the Seventh Circuit affirmed (311 F. 2d 524 (7th Cir. 1963)), and this Court denied certiorari (374 U. S. 806 (1963)).

Rosee then filed suit in the Circuit Court of Cook County. Because he named two employees of the Commodities Exchange Authority as alleged co-conspirators, the case was removed to the United States District Court once more. There, in a 76 page opinion, Judge Will found no evidence of a conspiracy involving the two agents and ordered summary judgment (No. 63 C 1348 (N. D. Ill. 1966)). He ordered the case remanded to the Circuit Court of Cook County as to the other defendants. Judge Will's opinion was affirmed by the Court of Appeals for the Seventh Circuit (Appeals No. 15886 and 16373) and this Court again denied certiorari (393 U. S. 1055 (1969) and rehearing (393 U. S. 1124 (1969)).

In the instant case, besides the trial in the Circuit Court of Cook County, and the decision by the Illinois Appellate Court, the Illinois Supreme Court has denied leave to appeal. Subsequently, Rosee has sought to reopen the case by several procedural devices in the Illinois trial and appellate courts, and the United States District Courts for the Northern District of Illinois and for the District of Columbia. (See *Rosee* v. *Bergland,* Civil No. 76-1721, dismissed April 26, 1977.)

Obviously, Rosee "has had his day in Court." Memo Order, p. 5, *Rosee* v. *Bergland, supra.*

51a, 64a) As to the non-participants, such as the respondent Baggot, the Appellate Court gave no binding effect at all to the arbitration finding, but it again found that there was no evidence of fraudulent conduct on their part—and certainly no "clear and convincing" evidence.[2] (See Appendix pp. 64a-65a)

2. The quantum of proof for fraud and conspiracy in Illinois has always been "clear and convincing evidence." e.g., *Bundesen* v. *Lewis,* 368 Ill. 623 (1938); *Tribune Co.* v. *Thompson,* 342 Ill. 503 (1930).

PETITIONER'S STATEMENT OF THE CASE.

The factual statements made by petitioner Rosee are for the most part grossly inaccurate. For the most part, they are bald allegations, without any citation to the record. Some of these matters are treated in our argument and, rather than be repetitious, we have not cited them here. As to some of the other more flagrant misstatements of the record, we briefly note:

(1) Petitioner asserts that worksheets supplied by Baggot & Morrison were fraudulently prepared a few days before the arbitration hearing. (Pet. Cert. 14) The Illinois Appellate Court notes, however (App. p. 54a), that Rosee has confused the "worksheets" with a compilation therefrom made by bookkeeper Haywood a few days before the hearing. The Court found "no evidence of fraudulent preparation as to any of the *actual worksheets.*" (App. 54a) (Emph. ours)

(2) Rosee asserts that his position cards and the worksheets show great disparities. (Pet. Cert. 14) Here again, the Appellate Court, in an exhaustive opinion, demonstrates that this charge is due to Rosee's misreading the position cards to reflect the closing position of a trader for the date *prior* to the one stamped on the card, rather than the closing position for the stamped, or proper date. (App. p. 55a)

(3) Rosee asserts that important P & S slips were removed from Baggot & Morrison records (Pet. Cert. 13) The Appellate Court found that the alleged missing slips involved *oat* transactions, a commodity which Rosee never traded in. Obviously, none of the missing slips could have been his. (App. p. 61a) And quite properly, the Appellate Court on this question found "there is no transaction before us and no claim advanced by plaintiff as to which absence of a P & S slip had any material effect." (App. p. 61a)

(4) Petitioner asserts that missing daily segregation records were essential to show his true position day by day. (Pet. Cert. 12) However, these sheets showed only the identity of individual customers who were in a *debit* position at the end of the day, *not those with credits.* The guts of Rosee's claim is that he had a *credit.* Moreover, the records were cumulative of other documents and, as the Appellate Court properly noted, their disappearance over more than a decade of litigation between state and federal courts is not sufficient to establish fraud. (App. p. 60a)

I.

PETITIONER'S PARTICIPATION IN THE ARBITRATION PROCEEDING WAS COMPLETELY VOLUNTARY, NOT COMPULSORY, AS HE ALLEGES.

The thrust of petitioner's argument is that under the Rules of the Board of Trade, submission of the controversy in question to an arbitration panel was "compulsory" or "mandatory" (Pet. Cert. pp. 18, 19, 25), and binding. The evidence speaks otherwise:

> (1) The Board of Trade is a voluntary association incorporated under a special legislative charter in the State of Illinois.

By its charter, the Board is empowered (*inter alia*) to:

> (a) establish such rules, regulations and by-laws for the management of its business, and the mode in which it shall be transacted, as the Board may think proper. (Bd. of Tr. Ex. 1, § 4)
>
> (b) admit or expel such persons as the Board may see fit, in a manner to be prescribed by rules, regulations and by-laws thereof. (§ 6)
>
> (c) constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as

may be prescribed in the rules, regulations and by-laws for the settlement of such matters of differences as may be *voluntarily submitted* for arbitration by members of the Association. (§ 7) (*Emph. added*)

(2) Petitioner applied for and was admitted to membership on the Board of Trade in 1944, at which time he expressly agreed to abide by the rules and regulations of the Association. (A. 4, 1380)

(3) Board of Trade Rule 130 provided that:

> "Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied . . . If the member alleged to be in default denies the default, *he shall be entitled to have the claim arbitrated*. If the claim is admitted or established by a final arbitration award, the defaulting member shall be suspended until he has satisfied and discharged all debts owing to members on exchange contracts. . . ." (Bd. of Tr. Ex. 1) (*Emph. added*)

With this backdrop,

(4) In June of 1960, respondent Morrison filed a $13,654.41 claim against Rosee with the Board of Trade. This allegedly represented Morrison's one-half interest in the amount Rosee owed the firm of Baggot & Morrison at the time it dissolved.

(5) Rosee was notified of Morrison's claim (Bd. of Tr. Ex. 2; A. 1382-83) and on June 10, 1960, he responded to the Secretary of the Board of Trade, requesting arbitration of Morrison's claim. His letter read:

"June 10, 1960

Mr. Warren W. Lebeck, Secretary
Board of Trade Building
Chicago 4, Illinois

Dear Mr. Lebeck:

Your letter of June 8, 1960 has been received.

In regard to this matter *I request that this be referred to the Arbitration Committee* of the Chicago Board of Trade as there are certain circumstances pertaining to this claim that should be arbitrated.

Sincerely,

Bernhard Rosee."

(Bd. of Tr. Ex. 3; A. 1383) (*Emph. added*)

(6) On July 19, 1960, Rosee and Morrison signed a document formally notifying the Board of Trade that the services of the Committee on Arbitration were requested to resolve a dispute between them. (Bd. of Tr. Ex. 4; A. 1383-84)

(7) Rosee and Morrison also signed an agreement *voluntarily* submitting their differences to arbitration before the Board's Committee on Arbitration. Indeed, the document recited that arbitration was invoked to "avoid proceedings in the courts." (Bd. of Tr. Ex. 5; A. 1384-85)

(8) Hearings were held on July 26, August 9 and 23, October 4, 7, 12, 18, 20 and 28 and on November 21, 60. (Arb. Tr.) Rosee has never claimed that he was suspended from trading during this time, nor is there anything in the record indicating that he was. (e.g. A. 1387)

(9) In early October, at a meeting of the Committee on Arbitration, petitioner filed a counter-claim against Morrison for $44,537.75. (Arb. Tr. 266-69; Bd. of Trd. Ex. 6)

However, on November 15, 1960, Rosee wrote to the Committee and advised that he was withdrawing this claim "upon the advice of counsel, *to litigate this matter in the proper court.*" (Bd. of Tr. Ex. 6; A. 1385-86) (*Emph. added*)

(10) On December 16, 1960, the Committee on Arbitration rendered an award for Morrison in the amount of $11,323.78 ($2,330.63 less than he claimed). (Bd. of Tr. Ex. 7; A. 294-96; 1386)

(11) On December 28, 1960, Rosee appealed to the Board of Trade Committee on Appeals. On February 15, 1961, that committee affirmed the Arbitration Committee's award. (Bd. of Tr. Ex. 8; A. 297; 1386)

(12) Rosee refused to pay the award, and, pursuant to Board of Trade Rule 130, he was suspended from membership on February 28, 1961, effective March 1, 1961. (Bd. of Tr. Ex. 9; A. 1387)

(13) Finally, on July 2, 1963, upon Rosee's continued refusal to pay the award, the Board of Trade, pursuant to Rule 123 (Bd. of Tr. Ex. 1; A. 14; 277), caused the sale of Rosee's membership.

Had Rosee used his money to pay the award rather than the fees of more than 30 lawyers (to date), he would still have his seat on the Board and still be free to engage in his favorite pastime of litigating this case. At any rate, it is clear that petitioner was not compelled to seek arbitration.

II.

PETITIONER'S CLAIM THAT THE ARBITRATION PROCEEDINGS DENIED HIM DUE PROCESS IS COMPLETELY WITHOUT BASIS.

In the first place, petitioner fails to demonstrate any state action which allegedly deprived him of due process of law. The Board of Trade is a purely private association, not vested with

any public function, nor intertwined with the federal or state governments. *Moose Lodge* v. *Irvis*, 407 U. S. 163 (1972); *Rosee* v. *Board of Trade*, 311 F. 2d 524 (7th Cir. 1963). The mere fact that the Board of Trade is subject to governmental regulation does not transfer the rules it promulgates from purely private to state action. *Moose Lodge* v. *Irvis, supra.* In today's society, all human behavior is subject to government regulation, state or federal.

The cases relied upon by petitioner, *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963) and *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973), are completely inapposite. Both arose under federal statutes (Sherman Anti-Trust and Commodities Exchange Act). Rosee must, however, establish a violation of constitutional right by state action to invoke this Court's jurisdiction. This he has not done.

Rosee's contention that he has been denied due process is strained at the utmost. He argues, in direct conflict with the record and in total disregard or misstatement of the holding of the Illinois Appellate Court, that that Court concluded that the decision of the Arbitration Committee of the Board of Trade back in 1961 was final and binding, even if it was arbitrary and discriminatory, and its findings in consequence not appealable. Further, he asserts that by denying his petition for leave to appeal from the adverse ruling of the Appellate Court, the Illinois Supreme Court denied him due process.

In the first place, the fact that Rosee is here petitioning for certiorari from the courts of review of Illinois refutes his contention that any court in Illinois held that the arbitration panel's decision was final and unappealable, even in the absence of fraud, unfairness or injustice. The Appellate Court's opinion plainly holds that the arbitration decision may be reviewed by courts and overturned on a finding of fraud, corruption or undue means. (See specifically App. p. 51a)

Second, we must presume that the Illinois Supreme Court, in denying his petition for leave to appeal, has considered all issues

raised, and that denial is, in effect, tacit approval of the Appellate Court's decision. If every denial of a petition for leave to appeal would suggest denial of due process, this Court would be busy indeed with the many petitions from the 50 states. In sum and short, the mere fact that the courts of review do not agree with a litigant is not a denial of due process. Yet, the effect of Rosee's brief states nothing more.

As to Rosee's specific claims of unfairness, without unduly burdening the Court with references to the petitioner's erroneous statements, we cite only a few instances of Rosee's gross disregard for the evidence.

(1) Rosee alleges that he was fraudulently induced to submit to arbitration by a promise of the Secretary of the Board of Trade that he would be furnished all of the records and documents he requested. (Pet. Cert. 7) But, according to the records, Rosee's request for arbitration preceded Secretary Lebeck's letter by a full month, so he could not have been "lulled" into arbitration by such inducement. (App. 39a) By the way, his "inducement" argument is inconsistent with his major argument that arbitration was compulsory and mandatory, and foisted upon him.

Also, the Arbitration Committee required that the parties' requests for documents be specific. (Arb. Tr. 179) It ordered Morrison to provide Rosee with all documents specifically requested, pursuant to its ruling. (*e.g.*, Arb. Tr. 116; A. 296) If Rosee did not get documents he now finds reason to complain of, it is because he did not make a specific request. This is un..ssailable.

(2) He also alleges that the arbitration was unfair because Mr. Morrison had the benefit of advice by Mr. Coughlin, a Board member and attorney, and he had no such help. (Pet. Cert. 7) The ruling of the Board of Trade limiting participation of attorneys to members of the Board did not deny Rosee the opportunity to seek the assistance of other

lawyer members. But, in any case, the record shows that Rosee had the assistance of counsel, if not at the hearings themselves, at least in preparation for them, for he conceded, for example, that he withdrew his counter-claim against Morrison "on the advice of counsel." (Arb. Tr. 502; Bd. of Tr. Ex. 6; A. 1385-86)

(3) His contention that the Committee refused to subpoena documents and witnesses is equally baseless. (Pet. Cert. 7) On one occasion, Rosee asked the Committee to call a Mr. Edwards, apparently as a Committee witness. The Committee told Rosee that it would not call Edwards as its own witness unless it could be shown that the witnesses' testimony would be of value, but that Rosee was free to call Mr. Edwards himself. (Arb. Tr. 212-13)

On one other occasion, the Committee denied Rosee's motion for production of certain bank records, apparently on grounds that they were irrelevant. (Arb. Tr. 209-11) These two incidents, the only ones cited by petitioner, hardly support a conclusion that the Committee refused Rosee the right to subpoena books, records and witnesses.

(4) Rosee's bald assertion that he was denied the right to file a counter-claim (Pet. Cert. 7) is at odds with his own testimony and the arbitration record. In fact, Rosee sent a letter requesting a counter-claim against Morrison. (Arb. Tr. 126) The Committee's Secretary stated that the request would be considered at the next meeting, and pointed out to Rosee that Morrison would have to approve submitting the claim to arbitration (since the rules did not make arbitration mandatory, but allowed for it only by agreement of both parties). (Arb. Tr. 270) Before the request was made to Morrison, and before a ruling was ever made by the Committee, Rosee, of his own volition, withdrew the request for a counter-claim "on the advice of counsel." (Br. of Tr. Ex. 6; A. 1385-86)

> (5) Finally, petitioner says he was summarily denied an appeal by the Committee on Appeals without time to prepare. (Pet. Cert. 7) There is absolutely no evidence in the record to support this contention. The evidence showed that he perfected an appeal on December 28, 1960, and the Committee had the case for consideration for almost a two month period, before affirming the Committee on Arbitration's decision. (Bd. of Tr. Ex. 8; A. 297; 1386)

Even if the Arbitration Committee and the Appeals Board had acted in the arbitrary, unjust and fraudulent manner Rosee ascribes to them, the fact remains that all of his grievances have now been aired in the highest courts of Illinois, the federal courts, and before various administrative tribunals. After all is said and done, the fact remains that the record abounds with evidence of full and impartial review of the arbitration hearings by the courts. What we have here is merely a litigant dissatisfied with the decisions of these courts of review who seeks somehow to elevate all that into a claim of constitutional deprivation.

CONCLUSION.

Rosee has not shown any valid reason why this Court should take jurisdiction. His due process arguments are a strained assortment of mis-statements of law and of the record. He has made the same arguments for twenty years to both the state and federal courts. They contain no more merit now than when made before.

Respondent James E. Baggot respectfully urges that Rosee's Petition for Writ of Certiorari be denied.

Respectfully submitted,

LEONARD M. RING,
RALPH L. BRILL,
Attorneys for Respondent,
James E. Baggott, Jr.

LEONARD M. RING & ASSOC.,
111 West Washington Street,
Chicago, Illinois 60602,
(312) 332-1765,
Of Counsel.